

#15424 CONTINUED  
IN VOL# 3121  
No. 15424 ✓

United States *See also*  
Court of Appeals *Vol. 3024*  
for the Ninth Circuit

FOX WEST COAST THEATRES CORPORA-  
TION, TWENTIETH CENTURY-FOX  
FILM CORPORATION and LOEW'S, IN-  
CORPORATED, Appellants,

vs.

PARADISE THEATRE BUILDING CORPORA-  
TION, Appellee.

PARADISE THEATRE BUILDING CORPORA-  
TION, Appellant,

vs.

FOX WEST COAST THEATRES CORPORA-  
TION, TWENTIETH CENTURY-FOX  
FILM CORPORATION and LOEW'S, IN-  
CORPORATED, Appellees.

Transcript of Record

In Six Volumes

VOLUME I.

(Pages 1 to 464, inclusive)

Appeals from the United States District Court for the  
Southern District of California,  
Central Division

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JUN 3 1957

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Cal. 941-5-2747

PAUL P. O'BRIEN, CLERK

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No. 15424

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United States  
Court of Appeals  
for the Ninth Circuit

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FOX WEST COAST THEATRES CORPORATION,  
TWENTIETH CENTURY-FOX  
FILM CORPORATION and LOEW'S, INCORPORATED,  
Appellants,

vs.

PARADISE THEATRE BUILDING CORPORATION,  
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FOX WEST COAST THEATRES CORPORATION,  
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## I.

## Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the above-named defendants under Sections 15 and 26 of Title 15, U.S.C.A., being part of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies", as amended, commonly [1A\*] known as the Sherman Act and the Clayton Act. The purpose of this action is to recover damages against the above-named defendants for injuring plaintiff in its business of exhibiting motion pictures in the Paradise Theatre at 9110 South Sepulveda Boulevard, Los Angeles 45, California, which injury proximately resulted from defendants' violations of the anti-trust laws of the United States; and to restrain and enjoin the defendants from continuing the illegal monopoly and the combination, conspiracies and contracts in restraint of plaintiff's trade and commerce.

2. The business of producing, distributing and exhibiting motion pictures and the activities of each branch of the motion-picture industry are within or directly affect trade and commerce among the several states. In the course of producing, distributing and exhibiting motion pictures, there is a constant, continuous stream of trade in commerce between the states and between the territories of the United States, consisting of the solicitation and

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\* Page numbers appearing at bottom of page of original Transcript of Record.



making of contracts, the assemblage of personnel, property and material at the studios or upon location for the production of pictures, the transportation of negative films from the studios to the laboratories where positive prints of motion-picture films are prepared and from there shipped to film exchanges throughout the United States. The transportation of said film from said exchanges to and from motion picture theatres located in the areas served by the respective exchanges, the interchange of said films between each exchange and other exchanges of the same distributor located in other states and territories of the United States, and the shipment of films from the exchanges throughout the United States to use for scrapping and final disposition.

3. Each of the defendants transacts business and maintains offices in the above-described district and division. [2]

## II.

### Description of Parties

4. The plaintiff, Paradise Theatre Building Corp., is a California corporation with its principal place of business in the City of Los Angeles, State of California. Plaintiff operates and has since August 23, 1950, operated the Paradise Theatre at 9110 South Sepulveda Boulevard, Los Angeles 45, California. The Paradise Theatre is a modern building erected just prior to August 23, 1950, at a cost of Four Hundred Eighty-eight Thousand Dollars (\$488,000.00), seats One Thousand Three Hundred Fourteen (1,314) persons and has sub-

stantial and adequate free parking facilities and is equipped, staffed and supervised, and plaintiff is and from the last mentioned date has been ready, willing and able to exhibit the best motion pictures at the earliest dates and otherwise operate a "first-run" motion picture theatre. The Paradise is in the fast growing Westchester community of Forty Thousand (40,000) persons in Southwest Los Angeles.

5. Defendant Twentieth Century-Fox Film Corporation, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of New York and is engaged in the business of producing, distributing and exhibiting motion pictures either directly or indirectly or through subsidiary or associated companies in various parts of the United States, including Los Angeles, California, and in foreign countries.

6. Defendant National Theatres Corporation, a subsidiary controlled by Twentieth Century-Fox Film Corporation, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1609 West Washington Boulevard, Los Angeles, California, and is engaged in the business of [3] exhibiting motion pictures, either directly or through associated corporations in various parts of the United States and more particularly in several of the western states, including California, and in the City of Los Angeles.

7. Defendant Fox West Coast Theatres Corpora-



tion, a wholly owned subsidiary of National Theatres Corporation, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California, with its principal place of business at 1609 West Washington Boulevard, Los Angeles, California, and is engaged in the business of exhibiting motion pictures, either directly or through subsidiary or associated companies in various parts of the United States, and more particularly in several of the western states, including California, and in the City of Los Angeles.

8. Defendant Warner Bros. Pictures, Inc., is and at all times herein mentioned was a motion picture company organized and existing under the laws of the State of Delaware, and is engaged in the business of producing, distributing and exhibiting motion pictures either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries.

9. Defendant Warner Bros. Picture Distributing Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is and at all times herein mentioned was a corporation organized and existing under the laws of the State of New York and is engaged in the business of distributing motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

10. Defendant Paramount Pictures, Inc., is and

at all times herein mentioned was a corporation organized and existing under the laws of the State of New York and is engaged in the business of producing, distributing and exhibiting motion [4] pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries.

11. Defendant Paramount Film Distributing Corporation, Inc., a wholly owned subsidiary of Paramount Pictures, Inc., is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and is engaged in distributing motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

12. Defendant Loew's Incorporated, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and is engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries.

13. Defendant Universal Corporation, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware. Prior to on or about May 25, 1943, Universal Pictures Company, Inc. was a subsidiary controlled by Universal Corporation, which, prior to the

last-mentioned date, was a corporation organized and existing under the laws of the State of Delaware and engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries. On the last - mentioned date the said corporations merged under the name of Universal Pictures Company, Inc.

14. Defendant Universal Film Exchanges, Inc. is a wholly owned subsidiary of Universal Pictures Company, Inc., [5] or Universal Corporation, and is and at all times herein mentioned was a corporation organized and existing under the laws of the State of New York, and is engaged in the business of distributing motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

15. Defendant United Artists Corporation is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and is engaged in the distribution of motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

16. The true names or capacity, whether corporate, associate or otherwise of defendants Doe One to Doe Ten, inclusive, are unknown to plaintiff and plaintiff therefore designates them by such fictitious names and when their true names are

discovered this complaint and these proceedings will be amended accordingly.

17. All of the defendants hereinabove described are engaged in production and/or distribution of motion pictures either directly or through subsidiary companies and are sometimes hereinafter referred to as producers, distributors and producer-distributors. The defendants Fox West Coast Theatres Corporation, National Theatres Corporation are sometimes hereinafter referred to collectively as Fox West Coast.

18. Fox West Coast directly or through subsidiary companies owns, controls and is affiliated with upwards of Two Hundred Fifty (250) theatres in Los Angeles and vicinity.

### III.

#### The Combination, Conspiracy and Monopoly

19. All of the defendants, each well knowing and acquiescing in the acts of the other, have for many years last [6] past conspired and combined with each other and each corporation within itself, by and through its officers and employees, unreasonably to restrain and monopolize trade and commerce and pursuant to said combinations and conspiracies have, in effect, unreasonably restrained and monopolized trade and commerce in the production, distribution and exhibition of motion pictures in the United States, including the State of California, and, more particularly, in the City of Los Angeles and vicinity, all in violation of Sections 1 and 2 of the Sherman Act.



IV.

Effect of Government's Major Motion Picture Case

20. Under the provisions of Section 16 of Title 15, U.S.C.A., a final judgment rendered in a suit brought by the United States to the effect that a defendant has violated the anti-trust laws shall be prima facie evidence against such defendant in any suit brought by any other party against such defendant under said laws as to all matters respecting which the said judgment would be an estoppel as between the parties thereto.

21. On July 20, 1938, the United States of America filed a complaint in the District Court of the United States for the Southern District of New York against Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Inc.; RKO Radio Pictures, Inc.; Columbia Pictures Corporation; United Artists Corporation; Universal Corporation; Universal Pictures Company, Inc.; Twentieth Century-Fox and National Theatres Corporation, among others, charging violations of the anti-trust laws. (United States, v. Paramount Pictures, et al., Civil Action No. 87-273.) On November 14, 1940, an amended and supplemental complaint was filed against the same defendants. Before trial, negotiations for settlement resulted in the entry of a [7] consent decree, reserving to the United States the right at the end of a three-year trial period to seek the relief prayed for in the amended complaint. At the end of the three-year period, the United States moved for trial against all defendants. The District Court, after trial, found that

defendants had violated Sections 1 and 2 of the Sherman Act.

22. On May 3, 1948, the Supreme Court of the United States affirmed the judgment of the District Court that defendants had violated Sections 1 and 2 of the Sherman Act. This judgment in favor of the United States would be an estoppel between the parties thereto as to the monopoly, conspiracies, combination and contracts pleaded in this complaint by plaintiff herein.

23. On February 8, 1950, the United States District Court for the Southern District of New York entered a final decree against Twentieth Century-Fox; National Theatres Corporation; Loew's Incorporated; Warner Bros. Pictures, Inc.; Warner Bros' Pictures Distributing Corporation; Universal Corporation; Universal Film Exchanges, Inc.; and United Artists Corporation, et al. prohibiting, among other things, the buying or leasing of films on a circuit basis, granting clearance between theatres not in substantial competition; and directing that Twentieth Century - Fox and others divorce their production and distribution business from their exhibition business. The decree provided further that the burden of sustaining the legality of a clearance is on the distributor.

## V.

Particular Acts of Defendants and the Effects of the Combination, Conspiracy and Monopoly of Plaintiff

24. For the year last past and to the present

time all of the distributor defendants, and each of them, in pursuance and in furtherance of said conspiracy; and in retaining [8] the effects of the conspiracy and in violation of the Anti-Trust laws of the United States, have:

a. Refused to license, sell or furnish motion pictures to plaintiff for exhibition on a first-run basis and to permit plaintiff to compete for such run in open and fair competition with other theatres similarly situated;

b. Permitted chain operated theatres to continue their monopoly of exhibiting motion pictures on early runs;

c. Arbitrarily, unfairly and wrongfully fixed the run, selection or clearance (the time which elapses between runs of the same picture in different theatres) of motion pictures in favor of other theatres, including Fox West Coast, and in discriminating against plaintiff's Paradise Theatre in the Westchester community, and refused to permit plaintiff to compete for first-run play-dates in open and fair competition with other theatres similarly situated, including the first-run Loyola Theatre, also located in Westchester, owned by defendant Fox West Coast Theatres Corporation;

d. Permitted the Loyola Theatre, operated by Fox West Coast to continue its monopoly of exhibiting motion pictures first-run in Westchester;

e. Permitted the Loyola Theatre, operated by Fox West Coast, to take unto itself all the product made available for first-run exhibition in Westchester;

f. Refused to license plaintiff the right to exhibit motion pictures first-run in Westchester thereby perpetuating the monopoly of the Loyola Theatre in exhibiting motion pictures first-run in Westchester;

g. Pursued a like policy in refusing the plaintiff [9] the right to exhibit motion pictures first-run in Westchester;

h. Granted clearance between theatres not in substantial competition;

i. Granted clearance to chain operated theatres in Inglewood over plaintiff's theatre located in Westchester;

j. Required bidding for pictures between theatres not in substantial competition;

k. Refused to license, sell or furnish motion pictures to the plaintiff for exhibition in Westchester seven (7) days after they have been exhibited first-run Los Angeles, except by bidding against Inglewood theatres;

l. Permitted Fox West Coast Theatres Corporation and Warner Bros. Pictures, Inc. theatres to exhibit pictures within seven-day clearance after first-run Los Angeles and denied plaintiff this privilege;

m. Permitted Fox West Coast Theatres to continue first-runs in their theatres without any clearance (moreover);

n. Favored Fox West Coast and other exhibitor defendants and discriminated against the plaintiff with respect to the terms or licensing of motion pictures, including selection, run and clearance,



designation of play dates, rentals, charges, allowances, price, road show engagements, previews, classification of films and other conditions and privileges in connection with exhibition of motion pictures.

o. Permitted chain operated theatres to enjoy a monopoly in the early run exhibition of motion pictures by means other than aforesaid which are presently [10] unknown to plaintiff but which plaintiff prays leave to add to this complaint when the same shall have been more particularly ascertained.

25. The plaintiff believes and therefore alleges that representatives of each of the distributor defendants have inspected or are otherwise aware that plaintiff's Paradise Theatre has new and modern physical equipment, free parking and a seating capacity in excess of 1300.

26. The plaintiff believes and therefore alleges that said defendants are aware that plaintiff's Paradise Theatre is located in Westchester on Sepulveda Boulevard in close proximity to the Loyola Theatre operated by Fox West Coast.

27. The plaintiff believes and therefore alleges that the defendant distributors in refusing to license plaintiff films for first-run exhibition in its Paradise Theatre and otherwise excluding plaintiff from competing for first-run pictures did so each of said defendants knowing that the others were doing the same thing.

28. The plaintiff at all times herein mentioned has desired to operate its theatre first-run and has

been willing, ready and able to pay first-run rentals to exhibit pictures first-run in its Paradise Theatre in Westchester and has so informed the defendant distributors herein. The plaintiff has moreover offered to negotiate for licenses to exhibit pictures in its Paradise Theatre in Westchester seven (7) days after they have been exhibited first-run in Los Angeles, without clearance over theatres in Inglewood or elsewhere.

29. On June 7, 1951, pursuant to the judgment of February 8, 1950, the Government and Twentieth Century-Fox entered into a consent decree which took cognizance of the Loyola Theatre's monopoly of the exhibition of first-run pictures in Westchester. The decree provided that Twentieth [11] Century-Fox's subsidiary National Theatres Corporation has the option of divesting itself of the Loyola Theatre in Westchester or subjecting it to a 60% major product limitation if an independent exhibitor is not afforded reasonable opportunity to procure films on the availability afforded the Loyola.

30. By the reason of monopolies of the defendants in the production, distribution and exhibition of motion pictures and of the combinations, conspiracies and otherwise illegal and wrongful activity and restraint of the defendants as aforesaid, the business of plaintiff as an independent exhibitor has been seriously impaired, injured and damaged and plaintiff has suffered great damage and operating losses and loss of profit and good will and reputation and prestige of its theatre as a fine

motion picture house has been seriously and irreparably impaired and injured and to the unfair and wrongful advantage of exhibitor defendants. Plaintiff has been compelled and is paying unreasonable and discriminatory rentals and has been compelled and is compelled to play inferior pictures on unfair and discriminatory terms to the damage and loss of plaintiff and to the advantage and exhibitor defendants and plaintiff is losing patronage for pictures and good will and otherwise continues to be threatened with further loss and damage by reason of the defendants' violation of the anti-trust laws of the United States.

31. Plaintiff's investment of approximately Four Hundred Eighty-eight Thousand Dollars (\$488,000.00) in the Paradise Theatre predicated on its suitability for operation as a high-class first-run theatre and upon the revenue to be derived from such an operation is placed in serious jeopardy of substantial or total loss.

32. Plaintiff's losses to date, comprising operating loss, good will, loss of reasonable profit and return on [12] investment as a result of defendants' violation of the anti-trust laws as aforesaid, are in excess of \$100,000.00. Plaintiff will suffer damage in the future in a sum or sums at this time unknown in that it now appears that defendants' activities will force plaintiff to close its theatre causing plaintiff further and tremendous losses, and when the extent thereof shall be ascertained, plaintiff seeks leave to amend this complaint to set forth the amount of said losses.

Wherefore, Plaintiff Prays:

1. That summons issue to each of the defendants commanding it to appear herein and to answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as the Court may make in the premises;

2. That plaintiff receive with interest as damages for the injury to its business the sum of One Hundred Thousand Dollars (\$100,000.00) and that the said sum be trebled to Three Hundred Thousand Dollars (\$300,000.00) and that the Court award a reasonable attorney's fee in accordance with Section 4 of the Clayton Act (15 U.S.C.A. 15) in such cases made and provided;

3. That defendants and each of them be permanently enjoined and restrained from each and every one of the unlawful practices alleged in plaintiff's complaint;

4. That the aforesaid combination and conspiracy, contracts, agreements, arrangements, and understandings in restraint of interstate trade and commerce, conspiracy to monopolize, attempts to monopolize and monopolization of interstate trade and commerce be adjudged and decreed to be unlawful, and that the contracts, agreements, arrangements and understandings and practices alleged in this complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act;

5. That the Court adjudge and decree that the [13] defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempted to monopolize and have monop-



olized the interstate trade and commerce in the licensing, supply and exhibition of motion pictures in violation of Sections 1 and 2 of the Sherman Act.

6. The defendants and any of their subsidiaries or affiliated companies, their officers, directors, agents and employees and their respective successors, assignees or transferees be enjoined from agreeing, combining, conspiring or contracting with each other or with any other person or corporation whatsoever to restrain, control or eliminate competition among themselves or with others, from restraining in any way and from agreeing on the prices, terms, or conditions in the licensing, supply and exhibition of motion pictures in the State of California or from conspiring or attempting to monopolize, or monopolizing the interstate trade and commerce herein alleged;

7. That the Court issue a preliminary injunction prohibiting the defendants, and each of them, and their officials, directors, agents and employees from continuing to boycott plaintiff's theatre by agreement or concert of action;

8. That plaintiff recover its costs herein; and

9. That the plaintiff have such other and further relief as the Court may deem proper.

JOSEPH L. ALIOTO,

ELWOOD S. KENDRICK,

/s/ By ELWOOD S. KENDRICK,

Attorneys for Plaintiff

Please Take Notice that plaintiff demands trial by jury in this action. [14]

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

# FIRST AMENDED COMPLAINT

For Damages and Injunctive Relief Under the  
Sherman and Clayton Anti-Trust Laws of the  
United States

(Jury Demanded)

The above-named plaintiff complains of the  
above-named defendants, and each of them, and  
alleges as follows:

## I.

### Jurisdiction and Venue

1. This complaint is filed and these proceedings  
are instituted against the above-named defendants  
under Sections 15 and 26 of Title 15, U.S.C.A.,  
being part of the Act of Congress of July 2, 1890  
entitled "An Act to Protect Trade and Commerce  
against Unlawful Restraint and Monopolies", as  
amended, commonly known as the Sherman Act and  
the Clayton Act. The purpose of [24] this action  
is to recover damages against the above-named de-  
fendants for injuring plaintiff in its business of  
exhibiting motion pictures in the Paradise Theatre  
at 9110 South Sepulveda Boulevard, Los Angeles  
45, California, which injury proximately resulted  
from defendants' violations of the anti-trust laws  
of the United States; and to restrain and enjoin  
the defendants from continuing the illegal monopoly  
and the combination, conspiracies and contracts in  
restraint of plaintiff's trade and commerce.

2. The business of producing, distributing and  
exhibiting motion pictures and the activities of each

branch of the motion-picture industry are within or directly affect trade and commerce among the several states. In the course of producing, distributing and exhibiting motion pictures, there is a constant, continuous stream of trade in commerce between the states and between the territories of the United States, consisting of the solicitation and making of contracts, the assemblage of personnel, property and material at the studios or upon location for the production of pictures, the transportation of negative films from the studios to the laboratories where positive prints of motion-picture films are prepared and from there shipped to film exchanges throughout the United States. The transportation of said film from said exchanges to and from motion picture theatres located in the areas served by the respective exchanges, the interchange of said films between each exchange and other exchanges of the same distributor located in other states and territories of the United States, and the shipment of films from the exchanges throughout the United States to use for scrapping and final disposition.

3. Each of the defendants transacts business and maintains offices in the above-described district and division. [25]

## II.

### Description of Parties

4. The plaintiff, Paradise Theatre Building Corp., is a California corporation with its principal place of business in the City of Los Angeles, State of California. Plaintiff operates and has since

August 23, 1950, operated the Paradise Theatre at 9110 South Sepulveda Boulevard, Los Angeles 45, California. The Paradise Theatre is a modern building erected just prior to August 23, 1950, at a cost of Four Hundred Eighty-eight Thousand Dollars (\$488,000.00), seats One Thousand Three Hundred Fourteen (1,314) persons and has substantial and adequate free parking facilities and is equipped, staffed and supervised, and plaintiff is and from the last mentioned date has been ready, willing and able to exhibit the best motion pictures at the earliest dates and otherwise operate a "first-run" Los Angeles motion picture theatre. The Paradise is in the fast growing Westchester community of Forty Thousand (40,000) persons in Southwest Los Angeles.

The defendant Fox West Coast operates the Loyola Theatre in the Westchester community on a first-run Los Angeles availability.

5. Defendant Twentieth Century-Fox Film Corporation, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of New York and is engaged in the business of producing, distributing and exhibiting motion pictures either directly or indirectly or through subsidiary or associated companies in various parts of the United States, including Los Angeles, California, and in foreign countries.

6. Defendant National Theatres Corporation, a subsidiary controlled by Twentieth Century - Fox Film Corporation, is and at all times herein mentioned was a corporation organized [26] and exist-



ing under the laws of the State of Delaware, with a place of business at 1609 West Washington Boulevard, Los Angeles, California, and is engaged in the business of exhibiting motion pictures, either directly or through associated corporations in various parts of the United States and more particularly in several of the western states, including California, and in the City of Los Angeles.

7. Defendant Fox West Coast Theatres Corporation, a wholly owned subsidiary of National Theatres Corporation, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California, with its principal place of business at 1609 West Washington Boulevard, Los Angeles, California, and is engaged in the business of exhibiting motion pictures, either directly or through subsidiary or associated companies in various parts of the United States, and more particularly in several of the western states, including California, and in the City of Los Angeles.

8. Defendant Warner Bros. Pictures, Inc., is and at all times herein mentioned was a motion picture company organized and existing under the laws of the State of Delaware, and is engaged in the business of producing, distributing and exhibiting motion pictures either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries.

9. Defendant Warner Bros. Picture Distribut-

ing Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is and at all times herein mentioned was a corporation organized and existing under the laws of the State of New York and is engaged in the business of distributing motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

10. Defendant Paramount Pictures, Inc., is and at all [27] times herein mentioned was a corporation organized and existing under the laws of the State of New York and is engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries.

11. Defendant Paramount Film Distributing Corporation, Inc., a wholly owned subsidiary of Paramount Pictures, Inc., is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and is engaged in distributing motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

12. Defendant Loew's Incorporated, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and is engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or asso-

ciated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries.

13. Defendant Universal Corporation, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware. Prior to on or about May 25, 1943, Universal Pictures Company, Inc. was a subsidiary controlled by Universal Corporation, which, prior to the last-mentioned date, was a corporation organized and existing under the laws of the State of Delaware and engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and in foreign countries. On the last-mentioned date the said corporations merged under the name of Universal [28] Pictures Company, Inc.

14. Defendant Universal Film Exchanges, Inc. is a wholly owned subsidiary of Universal Pictures Company, Inc., or Universal Corporation, and is and at all times herein mentioned was a corporation organized and existing under the laws of the State of New York, and is engaged in the business of distributing motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

15. Defendant United Artists Corporation is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and is engaged in the distribution of

motion pictures in various parts of the United States, including Los Angeles, California, and in foreign countries.

16. The true names or capacity, whether corporate, associate or otherwise of defendants Doe One to Doe Ten, inclusive, are unknown to plaintiff and plaintiff therefore designates them by such fictitious names and when their true names are discovered this complaint and these proceedings will be amended accordingly.

17. All of the defendants hereinabove described are engaged in production and/or distribution of motion pictures either directly or through subsidiary companies and are sometimes hereinafter referred to as producers, distributors and producer-distributors. The defendants Fox West Coast Theatres Corporation, National Theatres Corporation are sometimes hereinafter referred to collectively as Fox West Coast.

18. Fox West Coast directly or through subsidiary companies owns, controls and is affiliated with upwards of Two Hundred Fifty (250) theatres in Los Angeles and vicinity. [29]

### III.

#### The Combination, Conspiracy and Monopoly

19. All of the defendants, each well knowing and acquiescing in the acts of the other, have for many years last past conspired and combined with each other and each corporation within itself, by and through its officers and employees, unreasonably to restrain and monopolize trade and com-



merce and pursuant to said combinations and conspiracies have, in effect, unreasonably restrained and monopolized trade and commerce in the production, distribution and exhibition of motion pictures in the United States, including the State of California, and, more particularly, in the City of Los Angeles and vicinity, all in violation of Sections 1 and 2 of the Sherman Act.

20. As a part and parcel of the aforesaid conspiracy the distributor defendants have more particularly:

a) Refused to license, sell or furnish motion pictures to plaintiff for exhibition on a first-run Los Angeles availability;

b) Refused plaintiff the right to license motion pictures on such a run as to enable plaintiff to compete with the defendant's Fox West Coast Loyola Theatre;

c) Agreed to permit the defendant's National Theatres and Fox West Coast to create, establish, maintain and perpetuate a buying pool and combine in Southern California, including the City of Los Angeles, California;

d) The said buying pool and combine was founded for the purpose and within the intent and effect of giving the National Theatres and Fox West Coast a monopolistic buying power which has been used by said National Theatre and Fox West Coast to control the [30] licensing of film to Fox West Coast Theatres in Southern California and Los Angeles on preferential clearances, terms and conditions.

## IV.

## Effect of Government's Major Motion Picture Case

21. Under the provisions of Section 16 of Title 15, U.S.C.A., a final judgment rendered in a suit brought by the United States to the effect that a defendant has violated the anti-trust laws shall be prima facie evidence against such defendant in any suit brought by any other party against such defendant under said laws as to all matters respecting which the said judgment would be an estoppel as between the parties thereto.

22. On July 20, 1938, the United States of America filed a complaint in the District Court of the United States for the Southern District of New York against Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Inc.; RKO Radio Pictures, Inc.; Columbia Pictures Corporation; United Artists Corporation; Universal Corporation; Universal Pictures Company, Inc.; Twentieth Century - Fox and National Theatres Corporation, among others, charging violations of the anti-trust laws. (United States, v. Paramount Pictures, et al., Civil Action No. 87-273.) On November 14, 1940, an amended and supplemental complaint was filed against the same defendants. Before trial, negotiations for settlement resulted in the entry of a consent decree, reserving to the United States the right at the end of a three-year trial period to seek the relief prayed for in the amended complaint. At the end of the three-year period, the United States moved for trial against all defendants. The District Court, after trial,

found that defendants had violated Sections 1 and 2 of the Sherman Act. [31]

23. On May 3, 1948, the Supreme Court of the United States affirmed the judgment of the District Court that defendants had violated Sections 1 and 2 of the Sherman Act. This judgment in favor of the United States would be an estoppel between the parties thereto as to the monopoly, conspiracies, combination and contracts pleaded in this complaint by plaintiff herein.

24. On February 8, 1950, the United States District Court for the Southern District of New York entered a final decree against Twentieth Century-Fox; National Theatres Corporation; Loew's Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation; Universal Corporation; Universal Film Exchanges, Inc.; and United Artists Corporation, et al. prohibiting, among other things, the buying or leasing of films on a circuit basis, granting clearance between theatres not in substantial competition; and directing that Twentieth Century-Fox and others divorce their production and distribution business from their exhibition business. The decree provided further that the burden of sustaining the legality of a clearance is on the distributor.

## V.

Particular Acts of Defendants and the Effects of the Combination, Conspiracy and Monopoly on Plaintiff

25. For the year last past and to the present

time all of the distributor defendants, and each of them, in pursuance and in furtherance of said conspiracy; and in retaining the effects of the conspiracy and in violation of the Anti-Trust laws of the United States, have:

a) Refused to license, sell or furnish motion pictures to plaintiff for exhibition on a first-run Los Angeles availability. Refused plaintiff the right to [32] license motion pictures on such a run so as to enable it to compete with Fox West Coast's Loyola Theatre;

b) Permitted chain operated theatres to continue their monopoly of exhibiting motion pictures on early runs;

c) Arbitrarily, unfairly and wrongfully fixed the run selection or clearances (the time which elapses between runs of the same pictures in different theatres) of motion pictures in favor of other theatres, including Fox West Coast, to preclude plaintiff's Paradise Theatre in the Westchester community from operating on a first-run Los Angeles availability;

d) Permitted the Loyola Theatre, operated by Fox West Coast, to continue its monopoly in Westchester of exhibiting motion pictures on a first-run Los Angeles availability;

e) Refused to license plaintiff the right to exhibit motion pictures on a first-run Los Angeles availability thereby perpetuating the monopoly of the Loyola Theatre in exhibiting motion pictures in Westchester on a first-run Los Angeles availability;

f) Pursued a like policy in refusing plaintiff



the right to exhibit motion pictures in Westchester on a first-run Los Angeles availability;

g) Granted clearances between theatres not in substantial competition with plaintiff, including, among others, theatres in Hollywood, theatres on Wilshire Boulevard, a theatre on Western Avenue and theatres in downtown Los Angeles;

h) Granted clearances to chain operated theatres in Inglewood over plaintiff's theatre located in Westchester. The said theatres include the Imperial, Rio, Southside, United Artists, Academy, Fox, Fifth Avenue, Century Drive-In, [33] and the Ritz;

i) Required bidding for pictures between theatres not in substantial competition, i.e. between the Paradise Theatre and the Imperial, Rio, Southside, United Artists, Academy, Fox, Fifth Avenue, Century Drive-In, and Ritz Theatres;

j) Refused to regularly license, sell or furnish motion pictures to the plaintiff for exhibition in Westchester seven (7) days after first-run Los Angeles closing except by bidding against Inglewood theatres;

k) Permitted Fox West Coast Theatres Corporation's Academy Theatre and Warner's Beverly Theatre to exhibit pictures within seven-day clearance after first-run Los Angeles closing and denied this availability to plaintiff although plaintiff is farther from downtown Los Angeles and Hollywood than the aforesaid Fox West Coast and Warner theatres;

l) Permitted Fox West Coast Theatres to con-

tinue first-runs in their theatres without any clearance (moreover);

m) Favored Fox West Coast and other exhibitor defendants and discriminated against the plaintiff with respect to the terms or licensing of motion pictures, including selection, run and clearance, designation of play dates, rentals, charges, allowances, price, road show engagements, previews, classification of films and other conditions and privileges in connection with exhibition of motion pictures.

n) Permitted chain operated theatres to enjoy a monopoly in the early run exhibition of motion pictures by means other than aforesaid which are presently unknown to plaintiff but which plaintiff prays leave to add to this [34] complaint when the same shall have been more particularly ascertained.

26. The plaintiff believes and therefore alleges that representatives of each of the distributor defendants have inspected or are otherwise aware that plaintiff's Paradise Theatre has new and modern physical equipment, free parking and a seating capacity in excess of 1,300.

27. The plaintiff believes and therefore alleges that said defendants are aware that plaintiff's Paradise Theatre is located in Westchester on Sepulveda Boulevard in close proximity to the Loyola Theatre operated by Fox West Coast as a first-run Los Angeles theatre.

28. The plaintiff believes and therefore alleges that the defendant distributors in refusing to license plaintiff films for exhibition first-run Los Angeles in its Paradise Theatre and otherwise ex-

cluding plaintiff from competing for pictures on a first-run Los Angeles availability did so each of said defendants knowing that the others were doing the same thing.

29. The plaintiff believes and therefore alleges that at all times since its completion and opening of the Paradise Theatre that the defendant Fox West Coast has used the buying power of its many theatres to obtain film from the distributor defendants on preferential clearances, terms and conditions to those offered plaintiff.

30. The plaintiff at all times herein mentioned has desired to operate its theatre first-run Los Angeles availability and has been willing, ready and able to pay first-run rentals to exhibit pictures on a first-run Los Angeles availability in its Paradise Theatre in Westchester and has so informed the defendant distributors herein. The plaintiff has moreover offered to negotiate for licenses to exhibit pictures in its [35] Paradise Theatre in Westchester seven (7) days after they have been exhibited first-run in Los Angeles, without clearance over theatres in Inglewood or elsewhere.

31. On June 7, 1951, pursuant to the judgment of February 8, 1950, the Government and Twentieth Century-Fox entered into a consent decree which took cognizance of the Loyola Theatre's monopoly of the exhibition of first-run pictures in Westchester. The decree provided that Twentieth Century-Fox's subsidiary National Theatres Corporation has the option of divesting itself of the Loyola Theatre in Westchester or subjecting it to

a 60% major product limitation if an independent exhibitor is not afforded reasonable opportunity to procure films on the availability afforded the Loyola.

32. By the reason of monopolies of the defendants in the production, distribution and exhibition of motion pictures and of the combinations, conspiracies and otherwise illegal and wrongful activity and restraint of the defendants as aforesaid, the business of plaintiff as an independent exhibitor has been seriously impaired, injured and damaged and plaintiff has suffered great damage and operating losses and loss of profits and good will and reputation and prestige of its theatre as a fine motion picture house has been seriously and irreparably impaired and injured and to the unfair and wrongful advantage of exhibitor defendants. Plaintiff has been compelled and is paying unreasonable and discriminatory rentals and has been compelled and is compelled to play inferior pictures on unfair and discriminatory terms to the damage and loss of plaintiff and to the advantage of exhibitor defendants and plaintiff is losing patronage for pictures and good will and otherwise continues to be threatened with further loss and damage by reason of the defendants' violation of the anti-trust [36] laws of the United States.

33. Plaintiff's investment of approximately Four Hundred Eighty-eight Thousand Dollars (\$488,000.00) in the Paradise Theatre predicated on its suitability for operation as a high-class first-run theatre and upon the revenue to be derived from



such an operation is placed in serious jeopardy of substantial or total loss.

34. Plaintiff's losses to date, comprising operating loss, good will, loss of reasonable profit and return on investment as a result of defendants' violation of the anti-trust laws as aforesaid, are in excess of \$100,000.00. Plaintiff will suffer damages in the future in a sum or sums at this time unknown in that it now appears that defendants' activities will force plaintiff to close its theatre causing plaintiff further and tremendous losses, and when the extent thereof shall be ascertained, plaintiff seeks leave to amend this complaint to set forth the amount of said losses.

Wherefore, Plaintiff Prays:

1. That summons issue to each of the defendants, commanding it to appear herein and to answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as the Court may make in the premises;

2. That plaintiff receive with interest as damages for the injury to its business the sum of One Hundred Thousand Dollars (\$100,000.00) and that the said sum be trebled to Three Hundred Thousand Dollars (\$300,000.00) and that the Court award a reasonable attorney's fee in accordance with Section 4 of the Clayton Act (15 U.S.C.A. 15) in such cases made and provided;

3. That defendants and each of them be permanently enjoined and restrained from each and every one of the unlawful practices alleged in plaintiff's complaint;



4. That the aforesaid combination and conspiracy, [37] contracts, agreements, arrangements, and understandings in restraint of interstate trade and commerce, conspiracy to monopolize, attempts to monopolize and monopolization of interstate trade and commerce be adjudged and decreed to be unlawful, and that the contracts, agreements, arrangements and understandings and practices alleged in this complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act;

5. That the Court adjudge and decree that the defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempted to monopolize and have monopolized the interstate trade and commerce in the licensing, supply and exhibition of motion pictures in violation of Sections 1 and 2 of the Sherman Act.

6. The defendants and any of their subsidiaries or affiliated companies, their officers, directors, agents and employees and their respective successors, assignees or transferees be enjoined from agreeing, combining, conspiring or contracting with each other or with any other person or corporation whatsoever to restrain, control or eliminate competition among themselves or with others, from restraining in any way and from agreeing on the prices, terms or conditions in the licensing, supply and exhibition of motion pictures in the State of California or from conspiring or attempting to monopolize, or monopolizing the interstate trade and commerce herein alleged;

7. That the Court issue a preliminary injunction prohibiting the defendants, and each of them, and their officials, directors, agents and employees from continuing to boycott plaintiff's theatre by agreement or concert of action;

8. That plaintiff recover its costs herein; and

9. That the plaintiff have such other and further relief as the Court may deem proper.

JOSEPH L. ALIOTO,  
ELWOOD S. KENDRICK,  
/s/ By ELWOOD S. KENDRICK,  
Attorneys for Plaintiff

Please Take Notice that plaintiff demands trial by jury in this action. [39]

Acknowledgment of Service Attached. [40]

[Endorsed]: Filed January 23, 1952.

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[Title of District Court and Cause.]

## ANSWER OF LOEW'S, INCORPORATED

Defendant Loew's, Incorporated, for answer to plaintiff's first amended complaint, admits, denies and alleges as follows:

### First Defense

1. Denies the allegations of Paragraph 1 of said complaint.

2. Denies the allegations of Paragraph 2 of said complaint except as hereinafter admitted or al-

leged. Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph with respect to defendants other than this defendant. Admits [41] that many, but not all, phases of the distribution activities of Loew's Incorporated are in or directly affect trade and commerce among the several states.

3. Denies the allegations of Paragraph 3 of said complaint except as hereinafter admitted or alleged. Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph with respect to defendants other than this defendant. Admits that Loew's, Incorporated transacts business and maintains an office in the Southern District of California, Central Division.

4. Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of said complaint except admits that the Paradise Theatre is a modern building located at 9110 South Sepulveda Blvd. in that section of the City of Los Angeles sometimes known as "Westchester".

5. Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17 and 18 of said complaint.

6. Denies the allegations of Paragraph 12 of said complaint except as hereinafter admitted or

alleged. Admits and alleges that Loew's, Incorporated is and for many years past has been a corporation organized and existing under the laws of the State of Delaware, is engaged in the business of producing motion pictures in various parts of the United States, principally in the [41-A] State of California, and distributing motion pictures in various parts of the United States, including Los Angeles, California, and owns stock in corporations which own or operate motion picture theatres in various parts of the United States.

7. Denies the allegations of Paragraphs 19 and 20 of said complaint.

8. Denies the allegations of Paragraphs 21, 22, 23, 24, and 31 of said complaint except admits and alleges that on July 20, 1938, the United States of America commenced an action in the United States District Court for the Southern District of New York against Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Inc., RKO Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Corporation, Universal Pictures Company, Inc., Twentieth Century-Fox Film Corporation, and National Theatres Corporation, among others, being Equity No. 87-273 in the records and files of said Court, and that the proceedings had and the judgments and decrees entered in said action are as shown in the records and files of said Court in said action.

9. Denies the allegations of Paragraph 25 of said complaint.



10. Denies the allegations of Paragraphs 26, 27, 28, 29 and 30 of said complaint except as hereinafter admitted or alleged. Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraphs with respect to defendants other [42] than this defendant. Admits that Loew's, Incorporated is and has been aware that the Paradise Theatre is a modern building with new and modern physical equipment and is located at 9110 South Sepulveda Boulevard, approximately 2000 feet removed from the Loyola Theatre, which is located at the intersection of Manchester Avenue and Sepulveda Boulevard.

11. Denies the allegations of Paragraphs 32, 33 and 34.

#### Second Defense

12. Said complaint fails to state a claim against this defendant upon which relief can be granted.

Dated: March 18, 1952.

O'MELVENY & MYERS,  
HOMER I. MITCHELL,  
PHILIP F. WESTBROOK, JR.,  
BENNETT W. PRIEST,

/s/ By HOMER I. MITCHELL,

Attorneys for defendant Loew's,  
Incorporated [43]

Affidavit of Service by Mail Attached. [44]

[Endorsed]: Filed March 18, 1952.



[Title of District Court and Cause.]

ANSWER OF UNIVERSAL PICTURES COMPANY, INC. AND UNIVERSAL FILM EXCHANGES, INC.

Defendants Universal Pictures Company, Inc. (sued herein as Universal Corporation) and Universal Film Exchanges, Inc., for answer to plaintiff's first amended complaint, admit, deny and allege as follows:

First Defense

1. Deny the allegations of Paragraph 1 of said complaint.

2. Deny the allegations of Paragraph 2 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations [45] of said paragraph with respect to defendants other than these defendants. Admit that many, but not all, phases of the distribution activities of Universal Film Exchanges, Inc. are in or directly affect trade and commerce among the several states.

3. Deny the allegations of Paragraph 3 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph with respect to defendants other than these defendants. Admit that Universal Pictures Company, Inc. and Universal Film Exchanges, Inc. transact busi-

ness and maintain an office in the Southern District of California, Central Division.

4. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of said complaint except admit that the Paradise Theatre is a modern building located at 9110 South Sepulveda Blvd. in that section of the City of Los Angeles sometimes known as "Westchester".

5. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17 and 18 of said complaint.

6. Deny the allegations of Paragraphs 13 and 14 of said complaint except as hereinafter admitted or alleged. Admit and allege that Universal Film Exchanges, Inc. is a wholly owned subsidiary of Universal Pictures Co., Inc., is and for many years [46] past has been a corporation organized and existing under the laws of the State of New York, and is engaged in the business of distributing motion pictures in various parts of the United States, including Los Angeles, California. Admit and allege that Universal Pictures Company, Inc. is and for many years past has been a corporation organized and existing under the laws of the State of Delaware and is engaged in the business of producing motion pictures in various parts of the United States, principally in California. Admit and allege that, prior to on or about May 25, 1943, the

corporate name of Universal Pictures Company, Inc. was Universal Corporation, and Universal Pictures Company, Inc. was a subsidiary of Universal Corporation and that, on or about said date, Universal Pictures Company, Inc. was merged into Universal Corporation, and the corporate name of Universal Corporation was changed to Universal Pictures Company, Inc.

7. Deny the allegations of Paragraphs 19 and 20 of said complaint.

8. Deny the allegations of Paragraphs 21, 22, 23, 24 and 31 of said complaint except as hereinafter admitted or alleged. Admit that, on July 20, 1938, the United States of America commenced an action in the United States District Court for the Southern District of New York against Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Inc., RKO Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Corporation, Universal Pictures Company, Inc., Twentieth Century-Fox Film Corporation, and National Theatres Corporation, among others, being Equity No. 87-273 in the records and files of said Court, and that the proceedings [47] had and the judgment and decrees entered in said action are as shown in the records and files of said Court in said action.

9. Deny the allegations of Paragraph 25 of said complaint.

10. Deny the allegations of Paragraphs 26, 27, 28, 29 and 30 of said complaint except as herein-

after admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraphs with respect to defendants other than these defendants. Admit that Universal Film Exchanges, Inc. is and has been aware that the Paradise Theatre is a modern building with new and modern physical equipment and is located at 9110 South Sepulveda Boulevard, approximately 2000 feet removed from the Loyola Theatre, which is located at the intersection of Manchester Avenue and Sepulveda Boulevard.

11. Deny the allegations of Paragraphs 32, 33 and 34.

### Second Defense

12. Said complaint fails to state a claim against these defendants upon which relief can be granted.

Dated: March 18, 1952.

O'MELVENY & MYERS,  
HOMER I. MITCHELL,  
PHILIP F. WESTBROOK, JR.,  
BENNETT W. PRIEST,

/s/ By HOMER I. MITCHELL,  
Attorneys for Defendants Universal Pictures Company, Inc. and Universal Film Exchanges, Inc.

Affidavit of Service by Mail Attached. [49]

[Endorsed]: Filed March 18, 1952.



[Title of District Court and Cause.]

ANSWER OF WARNER BROS. PICTURES,  
INC. AND WARNER BROS. PICTURES  
DISTRIBUTING CORPORATION

Defendants Warner Bros. Pictures, Inc. and Warner Bros. Pictures Distributing Corporation, for answer to plaintiff's first amended complaint, admit, deny and allege as follows:

First Defense

1. Deny the allegations of Paragraph 1 of said complaint.

2. Deny the allegations of Paragraph 2 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph with respect to defendants other than these [50] defendants. Admit that many, but not all, phases of the distribution activities of Warner Bros. Pictures Distributing Corporation are in or directly affect trade and commerce among the several states.

3. Deny the allegations of Paragraph 3 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph with respect to defendants other than these defendants. Admit that Warner Bros. Pictures, Inc., and Warner Bros. Pictures Distributing Corporation each



transact business and maintain an office in the Southern District of California, Central Division.

4. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of said complaint except admit that the Paradise Theatre is a modern building located at 9110 South Sepulveda Blvd. in that section of the City of Los Angeles sometimes known as "Westchester".

5. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of said complaint.

6. Deny the allegations of Paragraphs 8 and 9 of said complaint except as hereinafter admitted or alleged. Admit and allege that Warner Bros. Pictures, Inc. is and for many years past [51] has been a corporation organized and existing under the laws of the State of Delaware, is engaged in the business of producing motion pictures in various parts of the United States, principally in the State of California, and owns stock in corporations which own or operate theatres in various parts of the United States, including Los Angeles, California. Admit and allege that Warner Bros. Pictures Distributing Corporation is a wholly owned subsidiary of Warner Bros. Pictures, Inc., is and for many years past has been a corporation organized and existing under the laws of the State of New York, and is engaged in the business of distributing mo-

tion pictures in various parts of the United States, including Los Angeles, California.

7. Deny the allegations of Paragraphs 19 and 20 of said complaint.

8. Deny the allegations of Paragraphs 21, 22, 23, 24 and 31 of said complaint except admit and allege that, on July 20, 1938, the United States of America filed a petition in the United States District Court for the Southern District of New York against Paramount Pictures Inc., Paramount Film Distributing Corporation, Loew's, Inc., RKO Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Corporation, Universal Pictures Company, Inc., Twentieth Century-Fox Film Corporation, and National Theatres Corporation, among others, being Equity No. 87-273 in the records and files of said Court, and that the proceedings had and the judgments and decrees entered in said action are as shown in the records and files of said Court in said action. [52]

9. Deny the allegations of Paragraph 25 of said complaint.

10. Deny the allegations of Paragraphs 26, 27, 28, 29 and 30 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraphs with respect to defendants other than these defendants. Admit that Warner Bros. Pictures Distributing Corporation is and has been aware that the Paradise Theatre is a modern

building with new and modern physical equipment and is located at 9110 South Sepulveda Boulevard, approximately 2000 feet removed from the Loyola Theatre, which is located at the intersection of Manchester Avenue and Sepulveda Boulevard.

11. Deny the allegations of Paragraphs 32, 33 and 34.

Second Defense

12. Said complaint fails to state a claim against these defendants upon which relief can be granted.

Dated: March 18, 1952.

O'MELVENY & MYERS,  
HOMER I. MITCHELL,  
PHILIP F. WESTBROOK, JR.,  
BENNETT W. PRIEST,

/s/ By HOMER I. MITCHELL,  
Attorneys for defendants Warner Bros. Pictures,  
Inc. and Warner Bros. Pictures Distributing  
Corporation. [53]

Affidavit of Service by Mail Attached. [54]

[Endorsed]: Filed March 18, 1952. [53]

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[Title of District Court and Cause.]

ANSWER OF PARAMOUNT PICTURES INC.  
AND PARAMOUNT FILM DISTRIBUT-  
ING CORPORATION

Defendants Paramount Pictures Inc., a dissolved corporation, and Paramount Film Distributing Cor-

poration, for answer to plaintiff's first amended complaint, admit, deny and allege as follows:

### First Defense

1. Deny the allegations of Paragraph 1 of said complaint.

2. Deny the allegations of Paragraph 2 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said [55] paragraph with respect to defendants other than these defendants. Admit that many, but not all, phases of the distribution activities of Paramount Film Distributing Corporation are in or directly affect trade and commerce among the several states.

3. Deny the allegations of Paragraph 3 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph with respect to defendants other than these defendants. Admit that, prior to December 31, 1949, Paramount Pictures Inc. transacted business and maintained an office in the Southern District of California, Central Division, and that subsequent to December 31, 1949, Paramount Film Distributing Corporation has transacted business and maintained offices in said district and division.

4. Allege that these defendants are without knowledge or information sufficient to form a be-



lief as to the truth of the allegations of Paragraph 4 of said complaint except admit that the Paradise Theatre is a modern building located at 9110 South Sepulveda Blvd. in that section of the City of Los Angeles sometimes known as "Westchester".

5. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17 and 18 of said complaint.

6. Deny the allegations of Paragraphs 10 and 11 of [56] said complaint except as hereinafter admitted or alleged. Admit and allege that, prior to December 31, 1949, Paramount Pictures Inc. was a corporation organized and existing under the laws of the State of New York and was engaged in the business of producing and distributing motion pictures in various parts of the United States, including Los Angeles, California; that, prior to December 31, 1949, Paramount Pictures Inc. owned stock in corporations which owned or operated motion picture theatres in various parts of the United States, including Los Angeles, California; and that, on December 30, 1949, Paramount Pictures Inc. was duly dissolved. Admit and allege that Paramount Film Distributing Corporation is and for many years past has been a corporation organized and existing under the laws of the State of Delaware, and is engaged in the business of distributing motion pictures in various parts of the United States, including, since December 31, 1949, Los Angeles, California.



7. Deny the allegations of Paragraphs 19 and 20 of said complaint.

8. Deny the allegations of Paragraphs 21, 22, 23, 24 and 31 of said complaint except admit and allege that, on July 20, 1938, the United States of America commenced an action in the United States District Court for the Southern District of New York against Paramount Pictures Inc., Paramount Film Distributing Corporation, Loew's, Inc., RKO Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Corporation, Universal Pictures Company, Inc., Twentieth Century-Fox Film Corporation, and National Theatres Corporation, among others, being Equity No. 87-273 in the records and files of said [57] Court, and that the proceedings had and the judgments and decrees entered in said action are as shown in the records and files of said Court in said action.

9. Deny the allegations of Paragraph 25 of said complaint.

10. Deny the allegations of Paragraphs 26, 27, 28, 29 and 30 of said complaint except as hereinafter admitted or alleged. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraphs with respect to defendants other than these defendants. Admit that Paramount Film Distributing Corporation is and has been aware that the Paradise Theatre is a modern building with new and modern physical equipment and

is located at 9110 South Sepulveda Boulevard, approximately 2000 feet removed from the Loyola Theatre, which is located at the intersection of Manchester Avenue and Sepulveda Boulevard.

11. Deny the allegations of Paragraphs 32, 33 and 34.

Second Defense

12. Said complaint fails to state a claim against these defendants upon which relief can be granted.

Dated: March 18, 1952.

O'MELVENY & MYERS,  
HOMER I. MITCHELL,  
PHILIP F. WESTBROOK, JR.,  
BENNETT W. PRIEST,

/s/ By HOMER I. MITCHELL,  
Attorneys for defendants Paramount Pictures Inc.  
and Paramount Film Distributing Corpora-  
tion. [58]

Affidavit of Service by Mail Attached. [59]

[Endorsed]: Filed March 18, 1952.

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[Title of District Court and Cause.]

ANSWER OF FOX WEST COAST THEATRES  
CORPORATION, NATIONAL THEATRES  
CORPORATION AND TWENTIETH CEN-  
TURY-FOX FILM CORPORATION TO  
FIRST AMENDED COMPLAINT

Defendants Fox West Coast Theatres Corpora-  
tion, National Theatres Corporation and Twentieth

Century-Fox Film Corporation severally answer plaintiff's First Amended Complaint herein as follows:

I.

Deny each and every allegation in paragraph 1 contained.

II.

Answering paragraph 2 defendants allege that some, but not all, phases of the business of producing, distributing and exhibiting motion pictures are within or directly affect trade or commerce among the several states. Defendants deny that the licensing for exhibition or exhibition of motion pictures in plaintiff's Paradise Theatre is within or directly affects trade or commerce among the [60] several states.

Except as hereinabove otherwise answered, defendants deny each and every allegation contained in paragraph 2.

III.

Deny that defendant National Theatres Corporation transacts business or maintains offices in the Southern District of California. Admit that defendants Twentieth Century-Fox Film Corporation and Fox West Coast Theatres Corporation transact business and maintain offices in the Southern District of California.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 with respect to the business of other defendants.

## IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4, except defendants admit that Fox West Coast Theatres Corporation owns the stock of a corporation which operates the Loyola Theatre in the Westchester community and that said theatre generally exhibits motion pictures distributed by Twentieth Century-Fox Film Corporation and occasionally motion pictures distributed by other distributors of motion pictures on a first run Los Angeles availability.

Except as hereinabove expressly admitted or alleged, deny each and every allegation contained in paragraph 4.

## V.

Admit that defendant Twentieth Century - Fox Film Corporation is a corporation organized and existing under the laws of the State of New York and that it is engaged in the business of producing and distributing motion pictures in various parts of the United States, including Los Angeles, California. Allege that said defendant owns in whole or in part the stock of subsidiary corporations which exhibit or which own the stock of corporations which exhibit motion pictures. [61]

Except as hereinabove expressly admitted or alleged, deny each and every allegation contained in paragraph 5.

## VI.

Admit that defendant National Theatres Corporation is a corporation organized and existing un-



der the laws of the State of Delaware and that it is a wholly owned subsidiary of defendant Twentieth Century-Fox Film Corporation. Allege that said defendant owns in whole or in part the stock of corporations which exhibit motion pictures or which themselves owns the stock of corporations which exhibit motion pictures in several of the western states, including California and the City of Los Angeles.

Except as hereinabove expressly admitted and alleged, deny each and every allegation contained in paragraph 6.

## VII.

Admit that defendant Fox West Coast Theatres Corporation is a wholly owned subsidiary of defendant National Theatres Corporation and that it has its principal place of business at 1609 West Washington Boulevard, Los Angeles, California. Deny that it is a corporation organized and existing under the laws of the State of California and in that regard allege that said defendant is a corporation organized and existing under the laws of the State of Delaware. Allege that said defendant owns in whole or in part the stock of corporations which for the most part are engaged in the business of operating motion picture theatres in the State of California. One of said corporations operates a single theatre in the State of Nevada and there are eight theatres operated in the State of Arizona by corporations, the stock of which is owned by said defendant.

Except as hereinabove expressly admitted and



alleged, deny each and every allegation contained in paragraph 7.

#### VIII.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14 and 15. [62]

#### IX.

Answering paragraph 18 defendants allege that Fox West Coast Theatres Corporation owns in whole or in part the stock of corporations which in turn own or operate approximately one hundred theatres in the County of Los Angeles, and except as so alleged deny the allegations in said paragraph contained.

#### X.

Deny each and every allegation contained in paragraphs 19 and 20.

#### XI.

Answering paragraph 21 of plaintiff's First Amended Complaint, defendants state that the provisions of Section 16 of Title 15 U.S.C.A. speak for themselves.

#### XII.

Answering paragraphs 22 through 24 of plaintiff's First Amended Complaint, defendants allege that on or about July 20, 1938, the United States of America instituted an action against certain defendants, including Twentieth Century-Fox Film Corporation and National Theatres Corporation, in the District Court of the United States for the

Southern District of New York entitled "United States of America v. Paramount Pictures, Inc., et al." bearing Equity No. 87-273, and that the proceedings taken therein are as disclosed in the files and records of said action and the appeals taken in said action.

Defendants further allege that none of the acts alleged to have been committed by defendants herein with respect to plaintiff or plaintiff's Paradise Theatre were in issue in said action of United States v. Paramount Pictures, Inc., et al., or were presented to or considered by the court therein and that the issues in United States v. Paramount were totally and completely different from the issues presented herein. [63]

Except as hereinabove otherwise answered, deny each and all of the allegations contained in paragraphs 22, 23 and 24.

### XIII.

Deny each and every allegation in paragraph 25 contained.

### XIV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 26 and 27, except that defendants admit that they were and are aware that plaintiff's Paradise Theatre is located in Westchester on Sepulveda Boulevard, and that it is close to the Loyola Theatre, which is operated by a wholly owned subsidiary of defendant Fox West Coast Theatres Corporation. Defendant Twentieth Century-Fox Film Corporation admits that it

was and is aware that plaintiff's Paradise Theatre has new physical equipment, free parking and a seating capacity in excess of thirteen hundred. With respect to the playing position of the said Loyola Theatre defendants refer to paragraph IV above.

#### XV.

Deny each and every allegation contained in paragraphs 28 and 29.

#### XVI.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30.

#### XVII.

Deny each and every allegation in paragraph 31 contained and in that regard allege that the decree therein referred to will speak for itself.

#### XVIII.

Deny each and every allegation contained in paragraphs 32, 33 and 34.

#### Second Defense

Said complaint does not state a claim against these defendants on which relief can be granted.

#### Third Defense

Plaintiff with full knowledge of all the material facts sought and accepted the benefits of the transactions of which it now complains and is in pari delicto with defendants, and each of them, with respect to each and all of the acts which are alleged in the First Amended Complaint to have been done.

That plaintiff has sought and accepted the benefits of the acts of which it now complains and is estopped from demanding any relief on account thereof.

#### Fourth Defense

That this court is without jurisdiction over defendant National Theatres Corporation. That said defendant is a corporation organized under the laws of the State of Delaware and has its principal office and place of business in the City of New York. Said defendant maintains no office in nor does it engage in any business in the State of California and it neither resides, is found or has any agent in the State of California.

Wherefore, these answering defendants pray that plaintiff's First Amended Complaint be dismissed as to these answering defendants and that plaintiff take nothing in this action as against these answering defendants and that said defendants may have and recover from plaintiff their costs herein incurred and to be taxed herein.

NEWLIN, HOLLEY, TACKABURY  
& JOHNSTON,

/s/ By FRANK R. JOHNSTON,

/s/ By HUDSON B. COX,

Attorneys for Defendants Fox West Coast Theatres Corporation, National Theatres Corporation and Twentieth Century-Fox Film Corporation. [65]

Affidavit of Service by Mail Attached. [66]

[Endorsed]: Filed March 18, 1952.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED JURY  
INSTRUCTIONS

Defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Twentieth Century - Fox Film Corporation, National Theatres Corporation and Fox West Coast Theatres Corporation submit proposed Jury Instructions Nos. 1 through 57 in the above entitled action.

Dated: July 2, 1956.

Respectfully submitted,

O'MELVENY & MYERS,

/s/ By HOMER I. MITCHELL,  
NEWLIN, HOLLEY, TACKABURY  
& JOHNSTON,

/s/ By FRANK R. JOHNSTON,  
Attorneys for Defendants. [115]

Defendants' Instruction No. 1

It is the duty of the court to state to you the principles of law which apply in this case, and it is your duty as jurors to follow the law as given to you by the court in these instructions and to apply it to the evidence in reaching your verdict. Statements by counsel as to what the law may be should be disregarded by you, if contrary to the



law as stated by the court. The instructions given to the jury constitute one connected charge and should be so regarded by you; that is to say, you should apply these instructions to the facts as a whole and not detach or separate any one instruction from any of the others unless the court specifically instructs you to do so. You are not to single out any certain sentence or any individual point, but are to regard these instructions as a whole and consider each in the light of the others.

### Defendants' Instruction No. 2

You, the jurors, are the sole triers of the facts. It is your recollection of the evidence that controls, not what counsel may say was the evidence on any issue, nor what the Court in its charge may assume the evidence to be. You, the jurors determine the ultimate facts from a consideration of the evidence. And you apply to those ultimate facts as you may find them the law as charged by the Court. The Court expresses no opinion on the issues of fact; and no questions or remarks of the Court during the trial should be so construed. Any references to the evidence by the Court during the charge to the jury will be only such as the Court thinks proper in order that you, the jurors, may know what are the issues of fact which you are to decide and to which you are to apply certain principles of law in arriving at your verdict. [117]

### Defendants' Instruction No. 3

Your verdict in this case must not be based upon

any preconceived ideas and notions, but must be based solely upon the evidence in the case.

Any information which you have gained outside of the courtroom in regard to this case or in regard to any other facts concerning the motion picture industry, in newspaper articles or on the radio or from any other source, must have nothing whatsoever to do with your verdict. [118]

#### Defendants' Instruction No. 4

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

In this action, plaintiff has the burden of proving each essential element of its case by a preponderance of the evidence. Should you find that the plaintiff has failed to produce this preponderance of evidence, then you must find in favor of the defendants. [119]

#### Defendants' Instruction No. 5

You will make no findings in this case based on speculation or conjecture. Proof requires a higher quality and dignity than mere suspicion or conjecture. [120]

#### Defendants' Instruction No. 6

The evidence here has been of two kinds, that

of oral testimony of witnesses, and written evidence, such as letters, contract, charts and documents. Neither kind is entitled to greater weight with you than the other, but all evidence properly before you is entitled to such weight as you choose to give it. [121]

Defendants' Instruction No. 7

Evidence may be classified as direct or circumstantial. Direct evidence is that sort of evidence by which a fact is proved directly and without inference from other facts. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the existence of known facts. In arriving at your verdict, you may consider all of the evidence, both direct and circumstantial.

Before a fact can be said to have been proved by circumstantial evidence alone, it is necessary that the circumstances shall reasonably give rise to an inference of such fact, and also that no other reasonable inference to the contrary can be drawn from the same circumstance. There is a presumption that private transactions have been fair and regular, and there is a presumption that a person is innocent of wrong. Accordingly, if two inferences may be reasonably drawn from the same facts, one pointing to violation of the law and the other to innocent conduct, then it is your duty to infer that of innocent conduct. [122]

Defendants' Instruction No. 8

Each defendant has the right to be represented

by attorneys of its selection. You are not to be influenced by, nor are you to draw any inference of concert of action and combination from the circumstances that certain groups of defendants have employed and are represented by the same attorneys.

Each defendant is entitled to individual consideration. [123]

#### Defendants' Instruction No. 9

The practice of licensing motion pictures for successive exhibitions or runs in a given area is economically necessary and is lawful. Since all theatres cannot simultaneously have the first run, each distributor must decide which theatre in which area or areas shall play its pictures first. The very nature of the motion picture business requires that preference be given to one theatre over another in the area or areas selected by the distributor. This is an exercise of business judgment which each distributor has to make every day. There are a limited number of motion pictures available for exhibition, and there are a limited number of prints of each motion picture. A distributor of motion pictures by the very act of distributing them gives preference to some exhibitors over others.

#### Defendants' Instruction No. 10

No theatre has the right, as a matter of law, to demand from a motion picture producer the right of prior runs. [125]

#### Defendants' Instruction No. 11

The plaintiff in this case, as an exhibitor of



motion pictures, did not have the right to compel any of the defendant motion picture distributors to grant it a preferred run, or preference in licensing product, or, in fact, to license it any motion pictures. There is nothing illegal in the mere fact that plaintiff could not get the pictures it wanted on the particular run that it wanted. [126]

Defendants' Instruction No. 12

Plaintiff has brought this action under the anti-trust laws of the United States, which permit any person injured in his business or property by reason of anything forbidden in the antitrust laws to sue for threefold the damages sustained by him, together with costs and attorneys' fees.

Plaintiff charges that defendants conspired to unreasonably restrain and to monopolize trade and commerce in motion picture films to the damage of the Paradise Theatre. Unless plaintiff has sustained the burden of proving such a conspiracy to restrain or monopolize, it has no right to recover anything from the defendants in this action. [127]

Defendants' Instruction No. 13

A conspiracy is an agreement, express or implied, between two or more persons to do an illegal act or to do a legal act in an illegal manner.

The conspiracy which would be material to this case would be an agreement among the defendants, or some of them, to deprive the Paradise Theatre of prior runs which it would have otherwise been licensed.

In order to show a conspiracy, a common design



is of the essence. A person, to become a party to a conspiracy, must combine with someone else to effect its object by means agreed upon. Where circumstantial evidence is relied upon to establish the conspiracy, it is not only necessary that the circumstances concur to show the existence of the conspiracy, but they must be inconsistent with any other rational conclusion. If the evidence can be reconciled with either innocence or culpability, the law requires that the inference of innocence be adopted. [128]

#### Defendants' Instruction No. 14

Separate independent action by each defendant is not illegal under the antitrust laws. Independent action of each distributor would not form the basis of a liability; there must be the element of a conspiracy. [129]

#### Defendants' Instruction No. 15

Each of the defendants has denied that there was any conspiracy among any of them concerning the licensing of motion pictures to the theatres in the Inglewood-Westchester area and contends that the decision of each of the distributor defendants with respect to the licensing of pictures to the Paradise Theatre was made by each distributor individually after an independent review of the economic aspects of the situation.

If you find that the decision of the distributor defendants during the period with respect to licensing of motion pictures to the Paradise Theatre was reached independently and in the exercise of

its own business judgment, then such licensing could not form the basis of a conspiracy. [130]

Defendants' Instruction No. 16

Proof of conspiracy requires more than mere suspicion or conjecture. There must be, by a preponderance of the evidence, either direct proof of conspiracy or circumstantial proof giving rise to an inference of conspiracy. [131]

Defendants' Instruction No. 17

Where the evidence from which plaintiff contends a conspiracy may be inferred is circumstantial, it is necessary, in order to find conspiracy, that no other reasonable inference can be drawn from the same circumstances. If two inferences can reasonably be drawn from the same evidence, one pointing to a conspiracy and the other to no conspiracy, it is your duty to infer that of no conspiracy. [132]

Defendants' Instruction No. 18

In considering whether the conduct of the defendants is evidence of a conspiracy, you are entitled to take into consideration the reasonableness of that conduct. If you find that the defendants acted on the basis of business factors which a reasonable person might take into consideration in determining their respective actions, such conduct standing along would not furnish any basis for an inference of conspiracy. Unless other evidence furnished some basis for inferring that the conduct of the defendants was in fact the result of a con-

spiracy, you would not be justified in determining that a conspiracy existed. [133]

Defendants' Instruction No. 19

If you find from the evidence that there was any similar or identical action on the part of any two or more defendants, but you conclude that what each did was the result of each having acted independently of any of the others, then you would not be justified in finding that such similar action resulted from any conspiracy of the defendants in violation of the antitrust laws.

Any similarity of the business practices of certain defendants does not necessarily lead to the conclusion that they were in a conspiracy. If you find that such similarity results from nothing more than common business solutions to identical problems in a competitive industry, the similarity of conduct would not support a conclusion that a conspiracy existed. [134]

Defendants' Instruction No. 20

As I have stated, similar or identical action in response to a common business problem does not require a conclusion that a conspiracy existed. That is true whether or not each of the defendants concerned knew what the others were doing. Businessmen frequently are aware of the action of their competitors and nevertheless they are entitled to adopt reasonable solutions to business problems even though in some cases they are aware that similar or even identical solutions to the same problems have been adopted by others. Conscious or uncon-

scious similarity or identity of conduct, when it is the result of independent action in respect to a common business problem, is not violative of the antitrust laws. [135]

#### Defendants' Instruction No. 21

In considering whether the conduct of the defendants is circumstantial evidence of a conspiracy, it is not the jury's function to substitute its judgment for that of the defendants. Each defendant had the right, acting without conspiracy, to license its pictures in such manner and to such theatres as it might see fit. There may be a number of different solutions to a given problem which might have been adopted in good faith and no one solution was necessarily correct or incorrect. [136]

#### Defendants' Instruction No. 22

As a result of the lawful and necessary practice of licensing motion pictures on successive runs, each distributor must determine the number of runs on a given availability which it will license in a particular area. In this case, each distributor had to determine the number of first runs which it would license in the entire Los Angeles area and the number of 7-day, 14-day and 21-day runs which it would license in the Inglewood-Westchester area. If these decisions were made without conspiracy with any other defendant, they are not subject to attack in this case under the antitrust laws. [137]

#### Defendants' Instruction No. 23

Also as a result of the lawful and necessary



practice of licensing motion pictures on successive runs, each distributor must determine the areas in which it licenses a given run. In this case, each distributor had to determine the areas in which it would license Los Angeles first runs and the areas in which it would license early subsequent runs. If these decisions were made without conspiracy with any other defendant, they are not subject to attack in this case under the antitrust laws. [138]

#### Defendants' Instruction No. 24

In determining whether the decisions of each distributor with respect to the number of runs it would license and the areas in which it would license them were pursuant to conspiracy with other defendants, you must take into consideration the reasonableness of these decisions in the light of the business considerations brought out in the evidence. Such factors as population, density, size and importance of communities and business centers, ease of travel between theatres, competition between theatres, and effect upon film rentals are appropriate for your consideration in this regard. If you find that the decisions of a particular distributor were reasonable solutions to problems of motion picture distribution, such decisions furnish no basis for any inference of conspiracy. [139]

#### Defendants' Instruction No. 25

All that the antitrust laws require with respect to runs is that they be licensed by each distributor in the exercise of its own business judgment with-



out combination or conspiracy with others. So long as it used its own business judgment, each distributor had the right to select its customers upon any basis which it desired. [140]

Defendants' Instruction No. 26

Subsidiaries of Twentieth Century-Fox owned and operated the Loyola, Academy, Fifth Avenue and Fox Inglewood from August of 1950 through September of 1951.

I instruct you that Twentieth Century-Fox in the exercise of its own business judgment, had the right to exhibit all of its motion pictures in the Loyola, Academy, Fifth Avenue and Fox Inglewood Theatres and any other theatres owned and operated by it in such manner and upon such terms and subject to such conditions as may have been satisfactory to it. I instruct you that there was no obligation on the part of Twentieth Century-Fox to offer its pictures to the Paradise Theatre and no inference of conspiracy may be drawn from the fact that it did not do so. [141]

Defendants' Instruction No. 27

Warner's licensed the Los Angeles area first run of its motion pictures to theatres owned by the Warner companies. They had a lawful right to do so to the exclusion of all other theatres in the Los Angeles area and no inference of conspiracy may be drawn from that practice. [142]

Defendants' Instruction No. 28

The evidence is undisputed that Paramount licensed the first run of its pictures to the Para-

mount Downtown Theatre and the Paramount Hollywood Theatre, operated by an independent exhibitor, Fanchon & Marco, Inc., because of certain franchise agreements. You are instructed that said franchise agreements were lawful and that no inference of conspiracy may be drawn from the fact that Paramount licensed its pictures to those theatres pursuant to those agreements. [143]

Defendants' Instruction No. 29

The evidence is undisputed that Loew's selected the Egyptian Theatre in Hollywood and the Loew's State Theatre in downtown Los Angeles for the first run exhibition of many of its pictures and that Universal selected the Vogue, United Artists, Ritz, Culver and Studio City Theatres for the first run exhibition of its pictures. Each of these distributors, acting independently, had the lawful right to make such a selection of its customers.

Defendants' Instruction No. 30

It was proper and lawful for a distributor to consider in selecting its customers the economic advantages offered by such customer, including Fox West Coast, over the lack of economic advantages offered by the plaintiff.

You are further instructed that so-called buying power which any defendant may have possessed, including Fox West Coast, is not illegal in itself.

Defendants' Instruction No. 31

The distributors are under no legal obligation to substitute an unknown customer for a proven one. [146]

Defendants' Instruction No. 32

Loew's, Paramount, Warner's, and Universal each offered the plaintiff the opportunity to license its pictures on a competitive basis with other theatres in the Inglewood-Westchester area. In this connection, you are instructed that competitive bidding is one of several lawful means of determining which of various theatres in a particular area shall be licensed pictures on a particular run or runs. No inference of conspiracy may be drawn if each of the various distributors independently adopted this method of licensing. [147]

Defendants' Instruction No. 33

To the extent that substantial competition is an issue in this case, I instruct you that the burden is upon the plaintiff to prove by a preponderance of the evidence that substantial competition did not exist between or among theatres. It is not the burden of the defendants, or any of them, to prove that substantial competition did exist between or among any theatres. [148]

Defendants' Instruction No. 34

It is essential to plaintiff's case with respect to subsequent runs that it prove the absence of substantial competition between it and the other theatres in the Inglewood-Westchester area. If plaintiff has failed to prove such absence of competition, you must find for the defendants on that phase of the case.

It does not follow, however, that the converse is true. Whether or not substantial competition ex-

isted between the Paradise Theatre and the other theatres in the Inglewood-Westchester area, each distributor, acting independently, was free to employ such method of distribution in that area as seemed best to it. [149]

Defendants' Instruction No. 35

Even if you were to determine that there was no substantial competition between the Paradise Theatre and other theatres in the Inglewood-Westchester area, but you are of the opinion that the distributors in good faith believed that those theatres were in competition and acted on the basis of independent judgment, then no inference of conspiracy should be drawn from the fact that the distributors treated those theatres as being in substantial competition. In other words, an error in judgment honestly made does not give rise to a charge of conspiracy.

If there are factors which could lead a reasonable man to believe there was substantial competition between these theatres, no inference of conspiracy could be drawn from the determination by the distributor that competition did exist, if such determination was made in good faith and on the basis of independent judgment, even though your own individual opinion might be that there was no substantial competition.

You are to ask yourselves whether such determination was made independently or whether it was the result of a conspiracy. [150]



Defendants' Instruction No. 36

The antitrust laws do not prohibit all restraints of trade, but only those which are unreasonable. The law recognizes that it is almost impossible to conduct a business of any kind without in some degree or another restraining trade. Perhaps an illustration will be helpful. Distributors of motion pictures might agree to prevent obscene or suggestive material from being shown on motion picture screens. Such a combination might well restrain trade in obscene or suggestive pictures. In point of fact the combination would be designed for that very purpose. Such a restraint would undoubtedly be considered a reasonable restraint of trade and hence lawful. [151]

Defendants' Instruction No. 37

If you find that the manner in which the defendant distributors distributed pictures in the Inglewood-Westchester area was reasonable, that would be the end of the case. You would not have to go any further. If you find it was unreasonable, then you have to determine whether or not it was the result of an illegal conspiracy or combination in restraint of trade. [152]

Defendants' Instruction No. 38

I instruct you that a violation of the antitrust laws does not give any right of action to any person or corporation unless he or it can establish that the business or property of that individual or corporation has been injured by reason of the violation of the antitrust laws. The plaintiff cor-



poration must not only establish the illegal conspiracy upon which its claim is based but that in fact it was injured by the conspiracy and that it suffered damages in some reasonably ascertainable and computable amount. [153]

Defendants' Instruction No. 39

I instruct you that it would be a violation of your duty as jurors to consider the question of injury or damages, if any, prior to determining the issue of liability or to allow the question of injury or damages, if any, to affect your judgment in any way in determining the issue of liability. The first question for you to decide is whether or not the plaintiff is entitled to recover in this action against the defendants. If you find from the evidence that plaintiff is not entitled to recover, then it is your duty to immediately return the verdict in favor of said defendants. [154]

Defendants' Instruction No. 40

In a private action, such as this, plaintiff must show that the acts claimed to have been done pursuant to a conspiracy proximately caused injury to plaintiff's business or property.

The doctrine of proximate cause requires plaintiff to prove that but for such a conspiracy and such acts, the injury complained of would not have occurred. If plaintiff corporation was injured by causes other than acts of the defendants, then such injury was not proximately caused by such acts of the defendants; in that case the loss, if any, which plaintiff corporation sustained is merely one

of the hazards and risks incident to the competitive system of business in this country.

If plaintiff corporation did not suffer any injury to his business or property, or if plaintiff corporation suffered injuries to his business or property, which were not proximately caused by the acts of the defendants pursuant to the conspiracy alleged in the complaint, it cannot recover. [155]

Defendants' Instruction No. 41

As part of its burden of proving that plaintiff corporation was injured in its business or property by reason of the acts complained of, plaintiff must show by the preponderance or greater weight of the evidence that an injury to its business or property occurred which, absent the alleged conspiracy, would not have occurred in the normal course of business. For example, if it suffered losses merely because plaintiff refused to enter into competition for pictures, or because of the excessive number of theatres in the Inglewood-Westchester area, or because of television competition, or because of a general decline in the patronage of motion picture theatres, such losses would not constitute an injury for which recovery can be had under the antitrust laws. [156]

Defendants' Instruction No. 42

In determining whether the acts of the defendants caused any injury to plaintiff's Paradise Theatre, you are entitled to take into consideration plaintiff's claim that it was not in substantial competition with other theatres in the Inglewood-

Westchester area. If in fact the Paradise Theatre was not in substantial competition with such theatres, it would not have lost any substantial or significant amount of patronage by reason of the fact that it sometimes played pictures later than other theatres in the area and you would be justified in concluding that the Paradise was not injured by any action of the defendants. [157]

Defendants' Instruction No. 43

You are instructed that plaintiff corporation was not entitled to be protected in any manner against the hazards of free and open competition. Under a system of free and open competition businessmen are permitted to market their product under conditions most favorable to them and on terms calculated to promote their own interests even at the expense of their competitors. All exhibitors in the Inglewood-Westchester area and elsewhere were entitled to compete vigorously and to the best of their ability with the Paradise Theatre even though such competition may have reduced plaintiff corporation's profits or eliminated them completely, so long as there was no conspiracy in violation of the antitrust laws.

Accordingly, if plaintiff corporation was injured solely by free and open competition, it has no cause of action under the antitrust laws. [158]

Defendants' Instruction No. 44

The mere fact that a given method of competition makes it difficult for competitors to do business is not of itself sufficient to brand that method

of competition as unreasonable or unlawful. So, if you find that any injury which plaintiff may have sustained resulted from natural competitive factors rather than an unreasonable restraint of trade on the part of the defendants or some of them, your verdict must be for the defendants. [159]

Defendants' Instruction No. 45

Plaintiff's right to recover is limited to actual damages, the amount of which can be determined with reasonable certainty from the evidence. Plaintiff is not entitled to damages which are merely speculative, remote or uncertain. I do not mean to say that plaintiff would be precluded from recovery because of the fact that damages may not be exactly computed. Damages are recoverable if you are satisfied from the evidence that they may be reasonably approximated upon the evidence in the case. The question of the amount that plaintiff would be entitled to, if you conclude plaintiff is entitled to a recovery, is entirely and solely your responsibility, but it must be based upon some evidence in the case as a foundation that furnishes at least a reasonable approximation of damages that plaintiff has sustained. [160]

Defendants' Instruction No. 46

The mere fact that the Paradise Theatre failed to make as much profit as some other theatre does not prove or disprove a conspiracy. In a competitive system it is natural that some people will be more successful than others.

Furthermore, even though you believe plaintiff



has been damaged by the acts of defendants, plaintiff is not entitled to recover anything unless it proves by a preponderance of the evidence that the defendants, or some of them, were engaged in the conspiracy which is charged in this case and that the damage resulted from that conspiracy. [161]

Defendants' Instruction No. 47

The law does not permit an injured person to stand idly by and allow damages to accumulate without doing that which a reasonable man would do under the circumstances to limit the amount of damages. A person injured by the wrongful act of another is bound to exercise reasonable care and diligence to avoid loss or minimize the resulting damages. Plaintiff cannot recover for losses which might have been prevented by reasonable efforts and expenditure on its part. If plaintiff could have minimized its losses, by entering into competitive bidding, it was under a duty to do so. [162]

Defendants' Instruction No. 48

The law under which this action was brought provides that any person who shall be injured in his business or property by reason of anything forbidden in the Federal anti-trust laws shall recover three times the damages sustained by him and costs of suit, including reasonable attorneys' fees.

If you should find that plaintiff in this case has suffered such injury in his business or property, your duty shall be to fix only the amount of actual damages, if any, which you shall have found to be proximately caused by acts of the defendants. It is



not your duty to triple the amounts of the actual damages, if any, or to fix the amount of the attorneys' fees, if any. These are matters required to be attended to by the Court. Therefore, in your deliberations, you shall give no consideration whatever to the tripling of damages or to the subject of attorneys' fees. [163]

Defendants' Instruction No. 49

The fact that the Court has instructed you with respect to damages is not to be taken by you as an indication that the Court believes or does not believe that plaintiff is entitled to recover damages. Such instructions are given to you solely to guide you in arriving at the amount of your verdict only in the event you find from the preponderance of the evidence and instructions of the Court that plaintiff is entitled to recover. If from the evidence and the instructions you find that plaintiff is not entitled to recover, then, of course, you are to disregard entirely the instruction which the Court has given you concerning damages. [164]

Defendants' Instruction No. 50

You are the sole judges of the credibility of the various witnesses who have appeared before you.

If you conclude that any witness has testified falsely in regard to any material fact, you are at liberty to disregard the entire testimony of that witness. [165]

Defendants' Instruction No. 51

You are the sole judges of the weight to be at-

tached to the testimony of any witness, including expert witnesses.

In weighing the testimony of a witness you may consider any financial interest he has in the outcome of the case. If you believe that such financial interest has colored his testimony, then to that extent you may disregard his testimony.

In weighing the credibility of a witness you may consider whether he displayed any bias or prejudice when testifying. [166]

#### Defendants' Instruction No. 52

No adverse inference is to be made against plaintiff or any party defendant because such party has not produced as a witness in this case a person who was its employee and who is not now employed by that party or who is now deceased or who is unable to appear as a witness because of reason of illness. [167]

#### Defendants' Instruction No. 53

The Court instructs you that evidence of acts and declarations of a deceased representative of any of the defendants against that defendant's interest, made within the scope of authority of such representative in the presence and observation of a witness is admissible. Such alleged acts and declarations of deceased representatives and the unsupported testimony of persons who would benefit financially by plaintiff's recovery in this lawsuit as to conversations between themselves and such deceased representative, however, though admissible, are to be viewed with caution. [168]

Defendants' Instruction No. 54

Any evidence that has been received of an act, omission or declaration of a party which is unfavorable to the interests of that party should be considered and weighed by you like any other admitted evidence but evidence of the oral admission of a party ought to be viewed by you with caution. [169]

Defendants' Instruction No. 55

You will recall that statements by one defendant, or its representative, were admitted in evidence only on a conditional basis as to other defendants. This was true also as to acts of, or correspondence with, a particular defendant. The acts and statements were received in evidence as against the particular defendant doing the act or making the statement.

The existence of a conspiracy cannot be established as to any defendant by the acts or statements of its alleged co-conspirators in its absence. The existence of the conspiracy and each defendant's connection with it must be established by independent proof based upon the reasonable inferences to be drawn from such defendant's own acts, own statements, and own conduct. [170]

Defendants' Instruction No. 56

The mere fact that plaintiff has named a number of parties as defendants in this action does not mean or require you to assume that all or any of them are liable to plaintiff. Plaintiff is required to present evidence which shows wrongdoing on the part of each defendant against whom it seeks dam-

ages. Plaintiff's claim against each defendant must be judged separately as to each such defendant, and the position of each defendant must be judged on its own merit. This is especially true wherever the facts relating to one defendant differ from the facts relating to some or all of the remaining defendants. Each defendant is entitled to the jury's individual consideration of the evidence as applied to it and to individual consideration as to whether or not that particular defendant participated in a conspiracy, if any, involving other defendants.

No defendant is to be prejudiced in your mind merely because it has been named as a defendant along with others in this case. It follows from what has just been said that you might from the evidence find a verdict in favor of one or more defendants, even though you might also find against two or more of the other defendants. [171]

#### Defendants' Instruction No. 57

Your verdict must be unanimous. You are expected to reach a verdict if you can conscientiously do so.

Each juror is entitled to his or her own opinion, but you are required to exchange views with your fellow jurors. That, obviously, is the very purpose of jury deliberation, to discuss and consider the evidence and listen to the arguments and reasons of your fellow jurors, to present your own individual points of view, and to reach an agreement, if you can, solely and only on the evidence, and if you can do so without violence to your own individual judgment.



You will not be living up to your oath of office if you vote for a verdict one way or the other, unless you are convinced that it is right, in accordance with the evidence in the case and the law. In other words, you are not to yield, for example, simply because you are outnumbered or outweighed. You vote with the others only if you are convinced on the evidence and the law that that is the correct way to decide the case. On the other hand, you should not hesitate, if convinced, to change a point of view if it appears to be erroneous to you. [172]

[Endorsed]: Filed July 5, 1956.

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[Title of District Court and Cause.]

## PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Pursuant to the Court's directions, plaintiff submits herewith the following Jury Instructions which it is presently contemplated it will request the Court to give at the above entitled action. It is anticipated that additional instructions turning upon the viewpoint of laws relied upon by the Court or relating to matters which may develop at or before the trial, will be submitted at appropriate times. [208]

### Plaintiff's Jury Instruction No. 1

"Under our system of jurisprudence, the court and the jury have separate and distinct functions to perform, each independent of the other, to a large degree. It is the duty of the court to pass



upon all questions of law, the admission of evidence, and the conduct of the trial generally, and finally, when the evidence is all in and the jury have heard arguments of counsel, to charge the jury as to the law controlling and governing their consideration of the case.

“It is the duty of the jury to determine the facts based upon the evidence which has come to the jury from the witness stand, and from no other source. When the jury has finally determined all the facts and heard the charge of the court as to the law, they should then apply the law to the facts and render their verdict accordingly. In determining the facts, the jury is supreme. There is no authority above and beyond the jury which can determine the facts in any case, and this court and any other court that may hereafter be called upon to decide this case is bound by your findings of the facts.

“Just as the finding of the facts of the case by the jury is binding upon the court, so is the law as given to the jury in this charge, binding upon you. Even though the jury, or some member of the jury, or some counsel in the case might not agree that the law is or should be as the court has interpreted it and given it to you in this charge, nevertheless you are bound by the court’s construction of the law, and that law is given to you as it has been written by the lawmakers of the nation and interpreted by the courts, as this court [209] understands it to be, and it is therefore binding upon you throughout the case, and must be your guide

in its application to the facts as you determine them to be in arriving at your verdict.

“Under your oath you have agreed to try this case in accordance with the law and the evidence, and a true verdict render according to the law and the evidence. You should not be actuated by motives of sympathy or by prejudice. You should not be concerned, and I am sure you will not be concerned, with who are the plaintiffs or who or what are the defendants. You came into the jury box without any preconceived views, ideas or opinions concerning the right or wrong of either of the parties, and what you now know about it should have been learned from this witness stand, and your final determination of the facts based upon that evidence.

“You are here to do as nearly exact justice as you can. You can do justice neither to the court nor to the jury if you have the thought of punishment in your minds. We lose track of the real issues and the real facts of any case. So that we must approach it as we should approach the ordinary affairs in our lives, and in determining these facts, you should take into consideration your common experiences in the affairs of life. That is one of the strong elements of our jury system, that when twelve men and women who are drawn from the ordinary walks of life, who represent the cross sections of life, are brought together in the jury box, and under an oath to try the case upon the law and the evidence, they may bring into play the experiences that they have gained through life

as they have viewed their own affairs and the affairs of others as they have lived their lives. That is the [210] strength of the jury system. That is why we are here. And, of course, you should look at it impartially and decide it upon the facts." [211]

Plaintiff's Jury Instruction No. 2

"You, the jurors, are the sole triers of the facts. It is your recollection of the evidence that controls, not what counsel may say was the evidence on any issue, nor what the court in its charge may assume the evidence to be. You, the jurors, determine the ultimate facts from a consideration of the evidence. And you apply to those ultimate facts as you may find them the law as charged by the court. The court expresses no opinion on the issues of fact; and no questions or remarks of the court during the trial should be so construed. Any references to the evidence by the court during the charge to the jury will be only such as the court thinks proper in order that you, the jurors, may know what are the issues of fact which you are to decide and to which you are to apply certain principles of law in arriving at your verdict." [212]

Plaintiff's Jury Instruction No. 3

This case was filed on September 18, 1951, by Paradise Theatre Building Corporation. I charge you that the Paradise Theatre Building Corporation had a right under the law to bring this action at the time it was filed. The right to bring an action at the time it was brought is purely a question of law which has been passed upon and deter-

mined by this Court, and it is not a matter for further consideration by this Court or by this jury in the determination of the facts and the application of the law upon which its verdict is to be based; so in the consideration of your verdict, you will not consider any questions with respect to the time of the bringing of this suit. It is properly and legally within this court, and your problem and my problem here is solely one of determination in accordance with the law and the evidence. [213]

Plaintiff's Jury Instruction No. 4

The plaintiff in this proceeding is Paradise Theatre Building Corporation, a California corporation.

The defendants are Fox West Coast Theatres Corporation, Twentieth Century Fox Film Corporation, National Theatres Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Inc., Universal Film Exchanges, Inc., Warner Bros. Pictures, Inc. and Warner Bros. Pictures Distributing Corporation. [214]

Plaintiff's Jury Instruction No. 5

"All of the named defendants are corporations, and in that connection I instruct you that a corporation, although an artificial being existing only in contemplation of law, is held to the same measure of liability as an individual and is entitled to the same rights or protection. A corporation acts through its officers, directors, and agents, and may through one or more of them conspire with another corporation or with other individuals. Any act of an officer, director or of an agent of a corporation,



which is done within the scope and line of his duties or authority is at law considered as the act of the corporation itself." [215]

Plaintiff's Jury Instruction No. 6

This action is based upon what is commonly known as the "Sherman Anti-Trust Act", Section 1 of which provides, among other things, that:

"Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal \* \* \*"

Section 2 of the Sherman Anti-Trust Act provides that:

"Every person who shall monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states \* \* \* shall be deemed guilty of a misdemeanor \* \* \*"

Section 5 of the Clayton Anti-Trust Act provides that any person who should be injured in his business or property by reason of anything forbidden in the anti-trust laws of the United States, may sue, therefore, in any federal court and shall recover the damages by him sustained.

In this connection, the Court instructs you as a matter of law that the course and conduct of business which involves a regular exchange and distribution of feature motion pictures and the course and conduct of business which involves the exhibition of feature motion pictures requires the movement of films and other equipment across state



lines and constitutes inter-state commerce, so that distributors and exhibitors of feature motion pictures are subject to, and within the purview of, the federal anti-trust laws. [216]

Plaintiff's Jury Instruction No. 7

"What is a conspiracy?"

"A conspiracy is an agreement, express or implied, between two or more persons to do an illegal act or to do a legal act in an illegal manner." [217]

Plaintiff's Jury Instruction No. 8

"How may a conspiracy be proved?"

"One way is by direct evidence of a party to the conspiracy or by his admissions and statements. You have heard the testimony on this subject and you will evaluate its worth.

"No formal agreement is necessary to constitute a conspiracy or a combination. Monopoly, combination or conspiracy in violation of the law or statute may be inferred from a course of dealing as well as through direct exchange of words. An unlawful conspiracy may be, and often is, formed without simultaneous action or agreement on the part of the conspirators. Acceptance without prior agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, restrains interstate commerce, is sufficient to establish an unlawful conspiracy under the antitrust laws. It is not necessary to a conspiracy that all of the conspirators be a part of the conspiracy from the beginning. A person may join a conspiracy after it has been agreed upon.

“Conspiracy is seldom capable of proof by direct testimony or evidence, but frequently must be inferred from things actually done, taking into consideration all of the facts and circumstances surrounding the conduct of the parties who are charged with the conspiracy. Proof of conspiracy, however, requires more than mere suspicion or conjecture. There must be either direct proof of conspiracy or circumstantial evidence sufficiently strong to give rise to an inference of conspiracy.

“Another way to prove a conspiracy is by proof [218] of facts from which a conspiracy can logically be inferred.” [219]

#### Plaintiff's Jury Instruction No. 9

“If you find that the defendants entered into a course of business which violated the antitrust laws and you further find that such course of business continued over a substantial period of time, then plaintiff is entitled to the presumption that such illegal course of business continued on and the defendants must come forward with evidence to establish their withdrawal from that illegal course of conduct.

“Defendants have the burden of establishing affirmative action to withdraw from the conspiracy by taking action antagonistic to the unlawful course of conduct into which they had entered, if you have found that to be a fact. Until the defendants do some act to disavow or defeat any unlawful purpose to monopolize or to restrain, they are, under the law, deemed to remain participants as conspirators.” [220]

Plaintiff's Jury Instruction No. 10

"You are instructed that under the law the owner of a theatre, such as the Paradise Theatre, was entitled, as of right, to enter the market and compete in the exhibition of motion pictures, free of any unlawful combination and conspiracy to restrain or monopolize the distribution or exhibition of motion pictures in violation of the antitrust laws." [221]

Plaintiff's Jury Instruction No. 11

"If you find from a preponderance of the evidence that the defendants, or any of them, conspired and combined with each other to limit the showing of desirable run motion pictures to certain theatres and that this prevented the plaintiff from obtaining an availability of first run Los Angeles or seven or fourteen days after Los Angeles pictures, then the defendant or defendants with respect to whom you so find will have violated the antitrust laws of the United States." [222]

Plaintiff's Jury Instruction No. 12

"If you find and believe from the evidence that the defendants had knowledge that substantially uniform systems of runs and clearances were being set up and maintained for the benefit of theatres owned by Fox West Coast Theatres Corporation and others, to aid and assist any of these corporations in restraining and preventing competition from independent exhibitors to license feature pictures on the same, or substantially the same, run and clearance as were afforded these companies,

then you are instructed that any contracts or agreements of any distributor defendant providing for runs and clearances in conformity with such substantially uniform system, were illegal and a violation of the antitrust laws and in and of themselves constituted a conspiracy and an illegal business practice.” [223]

Plaintiff’s Jury Instruction No. 13

“You are further charged that the prohibition of antitrust laws is against any course of conduct which monopolizes and unreasonably restrains any part of interstate trade, and it makes no difference and it is no defense that such unreasonable restraint of trade or monopoly operates only in a single city or in a particular part of a city, and affects only a part of the industry involved.

“Therefore, if you find that an unreasonable restraint of interstate trade or commerce did in fact exist, it would make no difference that such restraint or monopoly affected only Los Angeles or the Westchester District.” [224]

Plaintiff’s Jury Instruction No. 14

“If you find that Fox West Coast Theatres Corporation participated in an illegal agreement, conspiracy or combination to violate the antitrust laws as those terms have been defined, and if you find that the defendant National Theatres Corporation, acting through their representatives on the Board of Directors of Fox West Coast Theatres Corporation, participated in its affairs and had a voice in determining its policy, then National Theatres



Corporation would be liable for whatever Fox West Coast Theatres Corporation did in violation of the antitrust laws.

“If you find that National Theatres Corporation participated in an illegal agreement, conspiracy or combination to violate the antitrust laws as those terms have been defined to you, and if you find that Twentieth Century-Fox Film Corporation, acting through its representatives on the Board of Directors of National Theatres Corporation, participated in its affairs and had a voice in determining its policy, then Twentieth Century - Fox Film Corporation would be liable for whatever National Theatres Corporation did in violation of the antitrust laws.

“If you find that Warner Bros. Pictures Distributing Corporation participated in an illegal agreement, conspiracy or combination to violate the antitrust laws as those terms have been defined to you, and if you find that Warner Bros. Pictures Inc., acting through its representatives on the Board of Directors of Warner Bros. Pictures Distributing Corporation participated in its affairs and had a voice in determining its [225] policy, then Warner Bros. Pictures, Inc. would be liable for whatever Warner Bros. Pictures Distributing Corporation did in violation of the antitrust laws.”

Plaintiff's Jury Instruction No. 15

“If you find that there was a conspiracy on the part of the defendants, or some of them, to restrain trade, the fact that motion pictures are li-



censed under a copyright would not exempt such defendants from the antitrust laws of the United States.” [227]

Plaintiff’s Jury Instruction No. 16

“If you find that the defendants engaged in a combination and conspiracy in violation of the anti-trust laws with respect to and which had an effect on the playing position of the Paradise Theatre, then you are instructed that the fact that the Loyola Theatre was built and in operation before the Paradise Theatre is no defense.” [228]

Plaintiff’s Jury Instruction No. 17

“You are charged that an act which is harmless when done by one person or corporation becomes a public wrong when it is done by many persons or corporations acting in concern as part of a plan to violate the antitrust laws or as part of the sum of acts which are relied upon to effectuate such violation. It then takes on the form of a conspiracy and is prohibited if the result is hurtful to the public or to the individual against whom the concerted action is directed.” [229]

Plaintiff’s Jury Instruction No. 18

“If you find that the defendants were acting together in a conspiracy to restrain or monopolize the first run or early availabilities of motion pictures in Los Angeles or the Westchester area, then such a conspiracy may not be justified or explained by testimony of normal processes of competition, by comparison of theatres or by comparison of efficiency in business.” [230]

Plaintiff's Jury Instruction No. 19

"You are charged that the plaintiff in this case has the burden of producing evidence which you believe and which satisfies your minds by a preponderance of the evidence that the defendants in this case, or some of them, were engaged in a combination or conspiracy in violation of Section 1 or 2 of the Sherman Act which resulted in injury to the business or property of the plaintiff.

"In this respect you are charged that plaintiff does not have to persuade you beyond a reasonable doubt, but only by a preponderance of the evidence. By a preponderance of the evidence, it is not meant that more witnesses are required. The credibility as to witnesses is for the jury to decide. If you are satisfied as to any issue upon which the plaintiff has the burden that he has produced evidence which you believe, whether documentary or oral, and which satisfies your minds by a preponderance of the evidence, then you must find for plaintiff with respect to that issue." [231]

[Endorsed]: Filed July 5, 1956.

[Title of District Court and Cause.]

### MINUTES OF THE COURT

Date: July 9, 1956. At: Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge. Deputy Clerk: Mary O. Smith. Reporter: S. J. Trainor. Counsel for Plaintiff Elwood S. Kendrick and Jack Corinblit. Counsel for Defendants: Frank R. Johnston and David Massey for defendants Fox West Coast, et al.; Homer I. Mitchell and Philip F. Westbrook, Jr., for defendants Warner Bros., et al.

Proceedings: For jury trial.

Court orders that no reference be made to the Paramount case or national conspiracy in the opening statements.

It is ordered that cause is continued to July 10, 1956, 10 a.m., for jury trial.

Statements are made by counsel.

Attorney Mitchell moves to dismiss as to defendant United Artists Corp., and it is so ordered.

Attorney Mitchell moves to have cost of original transcript divided and that same be taxed as cost at completion of trial, together with copies.

Court orders that cost of original transcript and copies be taxed as costs.

JOHN L. CHILDRESS,  
Clerk. [264]

[Title of District Court and Cause.]

PLAINTIFF'S OFFER OF PROOF AND MEMORANDUM OF LAW WITH REFERENCE TO THE ADMISSIBILITY OF EVIDENCE SHOWING DEFENDANTS' ATTEMPT AND PURPOSE TO MONOPOLIZE IN THE WESTCHESTER - INGLEWOOD AREA

I.

This memorandum is directed primarily to plaintiff's offer to prove the agreements (and facts relating thereto) pursuant to which the Fox defendants restricted theatre construction in the Westchester-Inglewood area. Specifically, plaintiff offers to prove:

That in 1945, Fox West Coast acquired property for a theatre in Westchester and at the same time exacted from the seller a written commitment that the seller would not sell any land which it owned for use as a theatre for a period of five years or until 7000 units were constructed in the Westchester area. [279]

This seller at that time controlled substantially all of the undeveloped property in Westchester and the written agreement exacted by Fox West Coast in effect excluded the possibility of any outside theatre owner from constructing a theatre in Westchester. The written agreement shows that there was no relationship whatsoever between the demands made by Fox and the reasonable needs of a land developer, since Fox was:

(a) Not committed to build a theatre;

(b) If it did build a theatre, it had, substantially complete power as to the size and type of theatre and could, if it desired, construct a theatre anywhere from 300 to 2000 seats, a theatre which would charge 10c or \$1.00, a theatre which would play on first run or last run. The agreement which Fox exacted precluded the seller from selling property for use as a theatre under the conditions therein stated.

The document upon which plaintiff relies is marked as plaintiff's Exhibit 33b for identification.

Proof will further show that despite the fact that the agreement exacted by Fox had the escape clause, namely, a provision that if 7000 units were constructed, the restriction would no longer apply, that with the knowledge of Fox the seller failed to include this escape clause in the deeds of virtually every third party buyer of land.

Specifically, in the deed to the plaintiff in this case, plaintiff's offers to prove that such deed had a provision only that no theatre could be built until January 1, 1950, and did not contain any escape clause.

Plaintiff offers to prove that plaintiff's deed provided that if it violated its restriction which precluded it from building a theatre until January 1, 1950, that it would automatically lose its interest in that property and the property would [280] revert to the seller. The document upon which plaintiff relies in this connection is the deed marked as Exhibit 33a for identification.



The evidence will show that in 1948 Fox West Coast and the seller of Westchester property agreed in writing that 7000 units had been constructed in the Westchester district and that thereafter the theatre building restriction on sales by the seller were not required. But this evidence will further show that this release of the restriction was, to all effects and purposes, meaningless, because

(1) Property had been sold which had contained the theatre building restriction without the escape clause and therefore the theatre building restriction was in no way affected by the release in future given by Fox;

(2) By its terms, the 1948 release only affected sales made in the future and plaintiff's property as well as most other property had been sold before the release was executed. The restriction on Paradise property was as much in effect after 1948 as it had been before then. [280]

\* \* \* \* \*

[Endorsed]: Filed July 23, 1956.

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[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM RE OFFER  
AND TREATMENT OF U. S. VS. PARA-  
MOUNT

I.

First Offer

Plaintiff hereby offers in evidence the following exhibits which have been marked for identification

in this case: 44A through 44K-3 and 44L through 44Q-4. These exhibits include the Findings of Fact and Conclusions of Law and the decrees in the Paramount Case, together with certain exhibits in that case.

Plaintiff makes this offer and stipulates that none of these exhibits shall be shown to the jury or referred to by plaintiff in closing argument. This offer is made provided that the [308] Court explain at or prior to the close of the Plaintiff's case, the evidentiary impact of the Paramount decrees, Findings of Fact and Conclusions of Law upon the Paradise Case, which statement shall include the following:

1. That the United States Government filed an action against certain defendants, including the defendants Twentieth Century Fox Film Corporation, National Theatres Corporation, Loew's, Inc., Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., RKO Radio, Inc., Columbia Pictures Corporation and United Artists Corporation. That action was entitled United States vs. Paramount, et al.

2. That it was adjudicated in that case that the defendants Twentieth Century Fox, National Theatres Corporation, Loew's Inc., Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation and Universal Film Exchanges, Inc., RKO Radio Pictures, Inc., Co-

lumbia Pictures Corporation and United Artists Corporation had violated the anti-trust laws of the United States by entering into a national conspiracy; and

3. That among other things this conspiracy was found to have violated the anti-trust law by:

(a) Employing their collective monopoly power to exclude competitors from the first run market and that they had the intent to exercise this power and that they did so in violation of section 2 of the Sherman Act. (See Conclusion of Law, No. 13, U. S. vs. Paramount.)

(b) That these defendants used this power to actually exclude independents from the first run market and to restrict the distribution of pictures to independents in violation of sections 1 and 2 of the Sherman Act. (See Conclusion of Law, No. 14.)

4. That in U. S. vs. Paramount final decrees were entered against defendants Twentieth Century Fox Film Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Loew's, Inc., Paramount Pictures, Inc., Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation and United Artists Corporation, which enjoined them:

(a) "From granting any clearance between theatres not in substantial competition"; and

(b) "From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre solely upon the merits and without discrimination in favor of affiliated theatres,

circuit theatres or others.” (See: Warner’s decree, Exhibit 44-E, pages 2 and 4; Loew’s decree, Exhibit 44-D, pages 3 and 4; Twentieth Century Fox decree, Exhibit 44-F, pages 3 to 5; Paramount decree, Exhibit 44-G, pages 3 and 5; and the decree against Universal Film Exchanges, Inc., United Artists Corporation and Columbia Pictures Corporation, Exhibit 44-C, pages 3 and 4.)

5. The complaint *U. S. vs. Paramount* was filed in 1938 and the action was finally concluded in 1950.

#### B. Alternative Offer

If the Court declines to receive the offer set forth in A above and to make the statement indicated, plaintiff offers in evidence the decrees, Findings of Fact and Conclusions of Law, including Exhibits 44A through 44K-3 and Exhibits 44L through 44Q-4. It is stipulated that none of these exhibits shall go to the jury or be referred to by counsel except that the following portions of certain of these exhibits may be read to the jury and these portions [310] only shall be typed, marked as exhibits and used as evidence:

1. From Exhibit 44A, the Findings of Fact and Conclusions of Law in *U. S. vs. Paramount*:

The defendants Loew’s, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century Fox Film Corporation, National Theatres Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc. and United Artists Corporation, together with Paramount and RKO had the

collective monopoly power to exclude competitors from first run and this monopoly power was coupled with their intent to exercise this power in violation of section 2 of the Sherman Act.

These same corporations and RKO and Paramount used this power to actually exclude independents from the first run market and to restrict the distribution of pictures to independents in violation of sections 1 and 2 of the Sherman Act.

The defendants Loew's, Paramount, Warners, Universal and Twentieth Century Fox were enjoined from granting any clearance between theatres not in substantial competition and from licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others. (The foregoing injunctive provisions are contained as to Loew's in plaintiff's Exhibit 44D, pages 3 and 4; as to Warners in plaintiff's Exhibit 44E, pages 2 and 4; as to Twentieth Century Fox, in plaintiff's Exhibit 44F, pages 3 through 5; as to Paramount, in plaintiff's Exhibit 44G, pages 3 through 5; as to Universal, plaintiff's Exhibit 44B, pages 3 and 5.

Of course, under the Emich Case the Court should explain the relationship of U. S. vs. Paramount to the case at bar. [311]

\* \* \* \* \*

[Endorsed]: Filed August 3, 1956.



[Title of District Court and Cause.]

## SUPPLEMENTAL INSTRUCTIONS PROPOSED BY PLAINTIFF

### Plaintiff's Proposed Jury Instruction No. 5A

A plaintiff is not required to name all alleged co-conspirators as defendants, and the fact that some are not named defendants does not make the named defendants less liable if you find they participated in the conspiracy charged. [349]

### Plaintiff's Proposed Jury Instruction No. 6A

A restraint of trade means a restraint of competition. Restraint of interstate trade or commerce is unlawful if it is the result of a monopoly or is created by a contract, combination or conspiracy. It is not necessary for a restraint to be illegal that it should suppress all competition; a partial restraint of competition is sufficient. A restraint affecting the exhibition of motion pictures in Los Angeles or Westchester or affecting first run exhibition in Los Angeles or Westchester would be sufficient under the statute.

Trade may be restrained if it is hindered, obstructed, injured or destroyed in any way. An essential characteristic of a monopoly is a wrongful exclusion of competitors from the field. Monopoly is actually the concentration of business in the hands of a few to such an extent that competition is in some way unlawfully restrained. [350]

### Plaintiff's Proposed Jury Instruction No. 6B

The term "monopolize" in the antitrust laws

means to acquire through means, which are not specifically approved, a dominant position in the market so as to exclude actual or potential competition, and to follow such a course of conduct with the intent of monopolizing. It means to take steps toward acquiring a dominant position in the market and to take such steps when not encouraged by the law. Such monopolization occurs where a corporation or group of corporations seek to secure a dominant share of the market through restraints of trade which are prohibited, or through predatory practices, or through the bad faith use of otherwise legitimate means.

Section 2 of the Sherman Act prohibits both monopolization, and attempts to monopolize, and any combination or conspiracy to monopolize any part of the trade or commerce among the several states.

You are instructed that the term "any part" is applicable to the City of Los Angeles or to the area of Los Angeles known as the Westchester area, or to the first run market in the city of Los Angeles or to the first run market in the Hollywood Boulevard area. [351]

#### Plaintiff's Proposed Jury Instruction No. 6C

It is not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. No monopolist monopolizes unconscious of what he is doing.

If an arrangement or combination actually results in a monopoly the intent to monopolize is imputed from the result accomplished. Specific intent is necessary only where the acts fall short of accomplishing the results condemned by the statute.

It is unlawful to foreclose competitors from any substantial market.

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful. [352]

#### Plaintiff's Proposed Jury Instruction No. 8A

If you find that there was a conspiracy between two or more of the defendants named in this case and/or between them and other corporations whom you find to have participated in such conspiracy, then you are instructed that the acts, statements or conduct of each conspirator are chargeable to all of the conspirators. In law conspirators are deemed to be the agents of each other in carrying out the purposes of the conspiracy. [353]

#### Plaintiff's Proposed Jury Instruction No. 10A

A first run motion picture is an article of trade or commerce and if you find that the defendants in this case controlled that product and if you find that this control was accomplished by an attempt to monopolize, and if you further find that as a result a smaller competitor, such as plaintiff, was eliminated from competition or was prevented from competing effectively, then you are instructed that such action on the part of the defendants who par-

ticipated therein was an unreasonable restraint of trade within the meaning of the antitrust laws.

Plaintiff's Proposed Jury Instruction No. 10B

You are charged that it would be unlawful and a violation of the antitrust laws for any group of corporations to maintain a monopoly of the first run exhibition of motion pictures in the City of Los Angeles as a result of a conspiracy in violation of the antitrust laws by refusing to license pictures first run to any theatre other than those operated, managed or booked by other participants in the monopoly, or by restricting the pictures which they would so license to outsiders to the pictures which the other participants found to be undesirable. [355]

Plaintiff's Proposed Jury Instruction No. 11A

If you find that the defendant distributors each had its first run customer in Los Angeles and made no effort to license pictures on a first run to any other theatre in Los Angeles, and if you find that the operators of the defendants' theatres in Los Angeles each had a fixed source of supply of first run pictures from certain of the defendant distributors and did not seek to license the pictures of any other distributor on a first run, then from such circumstances you may infer that this arrangement was the result of an unlawful conspiracy to monopolize the exhibition of first run pictures and restraint of trade and commerce in the exhibition of first run pictures in Los Angeles to the exclusion of the plaintiff from the exhibition of first run pictures. [356]



## Plaintiff's Proposed Jury Instruction No. 12A

You are instructed that it is unlawful and an unreasonable restraint of trade under the Sherman Act for a distributor of motion pictures to grant any clearance between two theatres which are not in substantial competition with each other.

The word "clearance" means

"The period of time usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres."

The term "run" means

"The successive exhibitions of a motion picture in a given area, first run being the first exhibition in that area, second run being the next subsequent, etc."

U. S. vs. Paramount Pictures, Inc., et al., 334 U. S. 131, 145; 92 L. Ed. 1260, 1286.

If you find that the defendants granted clearance to the Academy, United Artists, Fox - Inglewood, Fifth Avenue, Southside, La Tigera or Imperial Theatres over the Paradise Theatre, then with respect to the theatre receiving it, such clearance would be unlawful if that theatre was not in substantial competition with the Paradise Theatre.

## Plaintiff's Proposed Jury Instruction No. 12B

The adoption of uniform business practice by members of a trade, may or may not be evidence of a conspiracy. If such uniform practices are the result of a specific or tacit agreement and if these practices are such as to unreasonably restrain trade, they will be condemned by the antitrust laws. [358]



Plaintiff's Proposed Jury Instruction No. 13A

If you find that the defendants or any of them conspired to deprive the Paradise Theatre of pictures for exhibition on an availability of 7 days after Los Angeles first run closing, by refusing to negotiate with the Paradise Theatre for such availability, then such conspiracy may unreasonably restrain trade in violation of the antitrust laws even though the Paradise Theatre and other theatres in the Inglewood-Westchester area were in substantial competition. [359]

Plaintiff's Proposed Jury Instruction No. 19A

You are instructed that evidence is to be evaluated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust. [360]

Plaintiff's Proposed Jury Instruction No. 19B

Evidence may be either direct or indirect. Indirect evidence is known also as circumstantial evidence.

Both direct evidence and circumstantial evidence are recognized and admitted in courts of justice and upon either or both, juries lawfully may base their findings.

The law makes no distinction between the two classes as to the degree of proof required, but re-

spects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

Thus in this case, each of the elements of plaintiff's case may be proved by indirect evidence if that evidence carries the convincing force needed to constitute a preponderance of the evidence. [361]

Respectfully submitted,

ELWOOD S. KENDRICK,  
JOSEPH L. ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,

/s/ By JACK CORINBLIT,

Attorneys for Plaintiff. [362]

[Endorsed]: Filed Aug. 13, 1956.

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[Title of District Court and Cause.]

## DEFENDANTS' PROPOSED JURY INSTRUCTIONS (ADDITIONAL AND REVISED)

Defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Paramount Pictures Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Twentieth Century-Fox Film Corporation, National Theatres Corporation and Fox West Coast Theatres Corporation submit revisions of Proposed Jury Instructions Nos. 15, 34 and 41 heretofore filed in the above entitled action on July 5, 1956 [363] and proposed Additional Jury Instructions 2A, 9A, 12A, 12B, 12C, 12D, 16A, 16B, 17A, 25A

25B, 29A, 31A, 32A, 33A, 33B, 33C, 34A, 34B, 45A, 45B, 45C, 45D and 57A.

Dated: August 14, 1956.

Respectfully submitted,

O'MELVENY & MYERS,

/s/ By HOMER I. MITCHELL,  
NEWLIN, TACKABURY &  
JOHNSTON,

/s/ By FRANK R. JOHNSTON,

Attorneys for Defendants [364]

#### Defendants' Instruction No. 2A

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You must never assume or speculate to be true any insinuation carried or suggested by a question put to a witness by examining counsel. The examiner's question is not evidence except only as it explains or throws light upon the answer. [365]

#### Defendants' Instruction No. 9A

You must be satisfied by the evidence that plaintiff made a specific, good faith request to each defendant distributor for any earlier run upon which it now seeks to base its damages. The law does not

Inglewood-Westchester area and contends that the decision of each of the distributor defendants with respect to the licensing of pictures to the Paradise Theatre was made by each distributor individually after an independent consideration of the business aspects of the situation.

If you find that the decision of the distributor defendants during the period with respect to licensing of motion pictures to the Paradise Theatre was reached independently and in the exercise of its own business judgment, then such licensing could not form the basis of a conspiracy. [371]

Defendants' Instruction No. 16A

You are instructed that it is presumed that defendants have not conspired in violation of the antitrust laws and that the burden is upon plaintiff to overcome that presumption and to prove conspiracy by a preponderance of the evidence. To the extent that plaintiff relies on circumstantial evidence, the burden is on plaintiff to prove that the circumstances upon which reliance is placed are entirely inconsistent with the presumption that defendants have complied with the antitrust laws.

Defendants' Instruction No. 16B

You are instructed that there is no direct evidence of the conspiracy charged in this case. Therefore, plaintiff's claim with respect to the conspiracy issue is completely dependent upon circumstantial evidence. [373]

Defendants' Instruction No. 17A

Similar methods of distribution, if they are rea-

sonable methods of the light of all of the circumstances, are not evidence of conspiracy regardless of whether you may be convinced that some other method of distribution would be better than the various methods used by defendant distributors. Similar methods of distribution, resulting from reasonable business solutions of identical problems are not evidence of conspiracy. [374]

Defendants' Instruction No. 25A

There is evidence that the Paradise Theatre did not gross as much or pay as much film rental on comparable runs as some other theatres in the Inglewood-Westchester area. This is a circumstance which each distributor was entitled to take into consideration in dealing with the Paradise Theatre. Conduct based upon this consideration cannot furnish any basis for an inference of conspiracy. [375]

Defendants' Instruction No. 25B

You are instructed, as a matter of law, that the licensing of first runs to theatres in the downtown Los Angeles, Hollywood and Wilshire districts to the exclusion of theatres in outlying districts in the Los Angeles metropolitan area is reasonable. Such practice on the part of any or all of the distributor defendants does not furnish any basis for an inference of conspiracy among them. [376]

Defendants' Instruction No. 29A

Differing practices of the distributor defendants after the 1950-1951 period with which this case is concerned are not competent evidence, in view of



authorize a person aggrieved to recover in the absence of such a good faith request. [366]

Defendants' Instruction No. 12A

You are instructed that as a matter of law the plaintiff has no right to recover because it was not licensed motion pictures on Los Angeles first run. You shall not give any consideration to plaintiff's claim that defendants conspired in respect of licensing Los Angeles first run. [367]

Defendants' Instruction No. 12B

You are instructed that, as a matter of law, the plaintiff has no right to recover because of plaintiff's claim that it was refused a 7 day availability except by bidding. You shall not give any consideration to plaintiff's claim that defendants conspired in respect of licensing their respective 7 day availabilities. [368]

Defendants' Instruction No. 12C

(If Instruction No. 12A is given and No. 12B is not given.)

It is your duty to consider, under all of my instructions, whether the Loew's, Warner Bros., Paramount and Universal defendants and the Twentieth Century-Fox defendants (including National Theatres Corporation and Fox West Coast Theatres Corporation) conspired with each other during the period from September 17, 1950 to September 17, 1951 to refuse a 7 day availability to the Paradise Theatre except by bidding. Each defendant had a right, acting independently, to refuse

a 7 day availability to the Paradise except by bidding, regardless of whether the theatres required to bid were in substantial competition. A fundamental question for you to determine is whether defendants so conspired with each other during that one-year period. [369]

Defendants' Instruction No. 12D

(If Instruction Nos. 12A and 12B are not given.)

It is your duty to consider, under all of my instructions, whether the Loew's, Warner Bros., Paramount and Universal defendants and the Twentieth Century-Fox defendants (including National Theatres Corporation and Fox West Coast Theatres Corporation) conspired with each other during the periods from September 17, 1950 to September 17, 1951 to refuse Los Angeles first run pictures to the Paradise Theatre or to refuse a 7 day availability to the Paradise Theatre except by bidding. Each defendant had a right, acting independently, to refuse Los Angeles first run pictures to the Paradise and to refuse a 7 day availability to the Paradise except by bidding, regardless of whether the theatres required to bid were in substantial competition. A fundamental question for you to determine is whether defendants so conspired with each other during that one-year period.

Defendants' Instruction No. 15

(In lieu of Instruction No. 15, filed July 5, 1956.)

Each of the defendants has denied that there was any conspiracy among any of them concerning the licensing of motion pictures to the theatres in the

Inglewood-Westchester area and contends that the decision of each of the distributor defendants with respect to the licensing of pictures to the Paradise Theatre was made by each distributor individually after an independent consideration of the business aspects of the situation.

If you find that the decision of the distributor defendants during the period with respect to licensing of motion pictures to the Paradise Theatre was reached independently and in the exercise of its own business judgment, then such licensing could not form the basis of a conspiracy. [371]

Defendants' Instruction No. 16A

You are instructed that it is presumed that defendants have not conspired in violation of the antitrust laws and that the burden is upon plaintiff to overcome that presumption and to prove conspiracy by a preponderance of the evidence. To the extent that plaintiff relies on circumstantial evidence, the burden is on plaintiff to prove that the circumstances upon which reliance is placed are entirely inconsistent with the presumption that defendants have complied with the antitrust laws.

Defendants' Instruction No. 16B

You are instructed that there is no direct evidence of the conspiracy charged in this case. Therefore, plaintiff's claim with respect to the conspiracy issue is completely dependent upon circumstantial evidence. [373]

Defendants' Instruction No. 17A

Similar methods of distribution, if they are rea-

sonable methods of the light of all of the circumstances, are not evidence of conspiracy regardless of whether you may be convinced that some other method of distribution would be better than the various methods used by defendant distributors. Similar methods of distribution, resulting from reasonable business solutions of identical problems are not evidence of conspiracy. [374]

Defendants' Instruction No. 25A

There is evidence that the Paradise Theatre did not gross as much or pay as much film rental on comparable runs as some other theatres in the Inglewood-Westchester area. This is a circumstance which each distributor was entitled to take into consideration in dealing with the Paradise Theatre. Conduct based upon this consideration cannot furnish any basis for an inference of conspiracy. [375]

Defendants' Instruction No. 25B

You are instructed, as a matter of law, that the licensing of first runs to theatres in the downtown Los Angeles, Hollywood and Wilshire districts to the exclusion of theatres in outlying districts in the Los Angeles metropolitan area is reasonable. Such practice on the part of any or all of the distributor defendants does not furnish any basis for an inference of conspiracy among them. [376]

Defendants' Instruction No. 29A

Differing practices of the distributor defendants after the 1950-1951 period with which this case is concerned are not competent evidence, in view of



changed conditions, and are not to be considered by you in any way. [377]

Defendants' Instruction No. 31A

You are instructed, as a matter of law, that the licensing of 7 day availabilities to theatres in the principal suburban cities of the Los Angeles metropolitan area, such as Inglewood, Huntington Park, Pasadena and Glendale, and a refusal of a separate 7 day availability to theatres in less important suburban communities adjacent to those cities is reasonable. Such practice on the part of any or all of the distributor defendants does not furnish any basis for an inference of conspiracy. [378]

Defendants' Instruction No. 32A

"Substantial competition" as the term is used in this case refers to competition between theatres for patronage. There is no precise definition of what constitutes substantial competition. There is no legal requirement that such competition be of any particular degree or extend to any particular percentage of such patronage. Competition for patronage is substantial if it is not trivial or inconsequential but is real and has substance. [379]

Defendants' Instruction No. 33A

Since there is no competent evidence in this case that there was not substantial competition between theatres in Downtown Los Angeles, Hollywood, or the Wilshire district and theatres in outlying areas on first run Los Angeles, plaintiff has failed to discharge its burden of proof on this question. [380]



Defendants' Instruction No. 33B

Substantial competition with respect to first run Los Angeles does not depend upon the amount of competition for patronage between a particular outlying theatre, such as the Paradise (were it to be licensed first run), and the theatre or theatres playing first run. Competition from the Paradise Theatre cannot be considered as though the Paradise were the only theatre involved. Other theatres in like outlying areas surrounding urban Los Angeles must be considered, for the existence of substantial competition depends upon the effect of licensing first runs to a theatre or theatres in all like outlying areas. Plaintiff's own witnesses have admitted that theatres playing Los Angeles first run in Downtown Los Angeles, Hollywood or the Wilshire district, drew some part of their patronage from each of such outlying areas, aggregating more than a trivial or inconsequential part of their patronage. You are instructed that this constitutes substantial competition with respect to first run.

Defendants' Instruction No. 33C

Clearance is defined as "the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres". There is no evidence that clearance was granted to any theatre in the Inglewood-Westchester area against the Paradise Theatre. You are instructed that clearance between subsequent runs is not an issue in this case. [382]

## Defendants' Instruction No. 34

(In lieu of Instruction No. 34, filed July 5, 1956.)

You are instructed that each defendant distributor had the right, acting individually, to determine how many 7-day runs it would license in the Inglewood-Westchester area regardless of whether or not theatres in that area were in "substantial competition". You are further instructed that, having determined how many 7-day runs to offer in that area, each defendant had the right, acting individually, to offer them by bidding or negotiating among theatres in that area, regardless of whether the theatres were in "substantial competition." The defendant distributors are not required to license a 7-day run to every theatre which was not in "substantial competition" with some other theatre or theatres. [383]

## Defendants' Instruction No. 34A

In determining the reasonableness or unreasonableness of differing distribution plans of defendants in which each offered the Paradise Theatre the opportunity to bid for the 7 day run against various other theatres (depending upon the respective plans), the matter of "substantial competition" among the theatres included in the bidding is only one of a number of matters which you should weigh. You must also consider the location of the theatres, their ability to pay film rentals, the business desirability or undesirability of providing a 7 day run for each theatre in the area which was not in substantial competition with some

other theatre or theatres, the problem of offering separate runs to various theatres or groups of theatres in a manner which would be fair to all theatres in the area, the difficulty and over-all effect of selecting which theatres should be required to bid and which should have a 7 day run without bidding, and other matters of that kind which a reasonable business man would consider in determining his business policies. Even if you should determine that a distributor required the Paradise to bid against theatres which you may find were not in substantial competition with the Paradise, such a determination would not necessarily require you to find that such conduct was unreasonable. Where the circumstances are such that it would be reasonable to require theatres not in substantial competition to bid for the 7 day run or runs offered by a particular distributor, then the conduct of the distributor in so licensing such [384] run or runs would not be unreasonable and would not be evidence of conspiracy. [385]

Defendants' Instruction No. 34B

Since there is no competent evidence in this case that there was not substantial competition between the Paradise Theatre and other theatres in the Inglewood-Westchester area, plaintiff has failed to discharge its burden of proof on this issue. [386]

Defendants' Instruction No. 41

(In lieu of Instruction No. 41, filed July 5, 1956.)

As part of its burden of proving that plaintiff corporation was injured in its business or prop-

erty by reason of the acts complained of, plaintiff must show by the preponderance or greater weight of the evidence that an injury to its business or property occurred which, absent the alleged conspiracy, would not have occurred in the normal course of business. For example, if it suffered losses merely because plaintiff refused to enter into competition for pictures, or because plaintiff's theatre did not have sufficient grossing capacity to make it a profitable theatre, or because of the excessive number of theatres in the Inglewood-Westchester area, or because of television competition, such losses would not constitute an injury for which recovery can be had under the antitrust laws. [387]

Defendants' Instruction No. 45A

In determining damages, if any, you may not consider in any way the evidences of grosses or profits of the Loyola Theatre or of grosses or profits of the Paradise Theatre on an assumed first run policy. As a matter of law, the plaintiff has no right to recover because it was not licensed motion pictures on Los Angeles first run. [388]

Defendants' Instruction No. 45B

In determining damages, if any, you may not consider in any way the evidence of grosses or profits of the Academy Theatre or of grosses or profits of the Paradise Theatre on an assumed 7 day run. As a matter of law, the plaintiff has no right to recover because of plaintiff's claim that it was not licensed motion pictures on a 7 day run without bidding. [389]



Defendants' Instruction No. 45C

Plaintiff has sought to base its proof of damages upon the assumption that the Paradise and Academy were comparable theatres. In evaluating this evidence, you must take into consideration the evidence with respect to the location of these two theatres, the population around them, and their grossing ability. You must also take into consideration that plaintiff's theory was that it should have been permitted to play a 7 day run day and date with all other theatres in the area. You should determine to what extent such a policy at the Academy Theatre would have reduced the Academy's gross receipts and such a policy at the Paradise Theatre would have affected the gross receipts of the Paradise. If you find that plaintiff is entitled to any damages on account of the manner in which defendants licensed their 7 day runs, it is entitled only to such damages, if any, as it suffered by reason of defendants' claimed conspiratorial refusal to serve the Paradise with a 7 day run playing day and date with the La Tijera and theatres in Inglewood. Plaintiff is not entitled to the difference between the profits it made and the profits it would have made had it been playing an exclusive 7 day run or a 7 day run day and date with one other theatre. [390]

Defendants' Instruction No. 45D

Plaintiff has also sought to base its proof of damages upon the assumption that the Paradise gross receipts on a first run policy would be the



same as the Loyola gross receipts. In evaluating this evidence, you must take into consideration that plaintiff's claim was that it should have been permitted to play first run day and date with other theatres in the area except the La Tijera and the Loyola. You should determine to what extent such a policy at the Loyola would have reduced the Loyola gross receipts and how such a policy at the Paradise Theatre would have affected the gross receipts of the Paradise. If you find that plaintiff is entitled to any damages on account of the manner in which defendants licensed their first runs, it is entitled only such damages, if any, as it suffered by reason of defendants' claimed conspiratorial refusal to serve the Paradise with first run playing day and date with other theatres in the Inglewood-Westchester area except the La Tijera and the Loyola. Plaintiff is not entitled to the difference between the profits it made and the profits it would have made had it been the only theatre playing first run in the Inglewood - Westchester area. [391]

Defendants' Instruction No. 57A

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. How-

ever, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. [392]

Acknowledgment of Service Attached. [393]

[Endorsed]: Filed August 14, 1956.

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[Title of District Court and Cause.]

DEFENDANTS' PROPOSED JURY INSTRUCTIONS (ADDITIONAL AND REVISED)  
(SUPPLEMENTAL)

Defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Paramount Pictures Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Twentieth Century-Fox Film Corporation, National Theatres Corporation and Fox West Coast Theatres Corporation submit revisions of Proposed Jury Instructions Nos. 10 and 42 heretofore filed in the above entitled action on July 5, 1956 [408] and Proposed Jury Instruction No. 29A heretofore filed in the above entitled action on August 14, 1956, and Proposed Additional Jury Instructions Nos. 13A and 13B.

Dated: August 16, 1956.

Respectfully submitted,

O'MELVENY & MYERS,  
/s/ By HOMER I. MITCHELL,  
NEWLIN, TACKABURY &  
JOHNSTON,  
/s/ By FRANK R. JOHNSTON,

Attorneys for Defendants. [409]

Defendants' Instruction No. 10

(In lieu of Instruction No. 10 filed July 5, 1956.)

No theatre has the right, as a matter of law, to compel a motion picture distributor to license it a prior run. [410]

Defendants' Instruction No. 13A

In determining whether any of the defendants were parties to a conspiracy as alleged by plaintiff, you may not consider evidence of acts and declarations of corporations which are not parties to this lawsuit, such as RKO, Columbia, United Artists Corporation and United Artists Theatres Circuit.

Defendants' Instruction No. 13B

When a person who is an agent pursues some activity or object or makes declarations not for his principal, but for the agent's own purpose, or pursues some activity or object or makes declarations in behalf of some other corporation or entity, the principal is not responsible for anything done or not done or declarations made during the course of such activity.

This is true even though the agent uses the principal's property. [412]

Defendants' Instruction No. 29A

(In lieu of Instruction No. 29A filed August 14, 1956.)

Changes in distribution practices of the distributor defendants after the 1950 - 1951 period with which this case is concerned are not competent evidence, in view of changed conditions, and are not to be considered by you in any way. [413]

Defendants' Instruction No. 42

(In lieu of Instruction No. 42 filed July 5, 1956.)

In determining whether the acts of the defendants caused any injury to the plaintiff's Paradise Theatre, you are entitled to take into consideration plaintiff's claim that it was not in substantial competition with other theatres in the Inglewood-Westchester area. If in fact the Paradise Theatre was not in substantial competition with such theatres, you may consider whether and to what extent that fact indicates that the Paradise did not lose any substantial or significant amount of patronage by reason of the fact that it sometimes played pictures later than other theatres in the area. [414]

Acknowledgment of Service Attached. [415]

[Endorsed]: Filed August 16, 1956.

[Title of District Court and Cause.]

# DEFENDANTS' OBJECTIONS TO PLAINTIFF'S JURY INSTRUCTIONS

Defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Paramount Pictures Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Twentieth Century-Fox Film Corporation, National Theatres Corporation and Fox West Coast Theatres Corporation hereby object to Plaintiff's Proposed Jury Instructions filed herein on or about July 5, 1956 and Plaintiff's Proposed Supplemental Instructions filed herein on or about August 14, 1956, in the [416] following particulars and upon the following grounds: [417]

\* \* \* \* \*

10. Object to Plaintiff's Instruction No. 12 in its entirety upon the ground that it improperly equates knowledge with conspiracy. Substantially uniform conduct knowingly engaged in, as the result of reasonable solutions to common business problems, is not evidence of conspiracy and certainly is not the equivalent of conspiracy. [420]

\* \* \* \* \*

19. Object to Plaintiff's Instruction No. 6A in its entirety because it does not recognize that only unreasonable restraints of trade are inviolation of the Sherman Act. Moreover, singling out the "Westchester" area in lines 9 and 10 of said Instruction



suggests that Westchester is, in the Court's view, separate and distinct from Los Angeles and Inglewood, whereas the evidence is undisputed that it is a part of the City of Los Angeles, adjacent to the City of Inglewood. [423]

\* \* \* \* \*

21. Object to Plaintiff's Instruction No. 6C in its entirety because it again seeks to inject the issue of monopoly into this case, whereas no such issue has been framed or tried. (See Objection No. 5, *supra*.) Moreover, the statement "It is unlawful to foreclose competitors from any substantial market," ignores completely that it is perfectly lawful to do so by means which are not violative of the Sherman Act.

22. Object to Plaintiff's Instruction No. 10A in its entirety. This Instruction speaks in terms of "an attempt to monopolize", whereas the only violation charged in the First Amended Complaint is a conspiracy unreasonably to restrain and monopolize trade and commerce. (See Objection No. 5, *supra*.) Moreover, the Instruction is almost completely unintelligible. There is no such thing as a "first run motion picture" in the sense in which plaintiff uses it, since any motion picture, which is an article of trade or commerce, is exhibited upon various runs. There is no evidence in the record to support the suggestion that plaintiff was "eliminated from competition". Moreover, the Instruction ignores completely that a finding of conspiracy is essential to plaintiff's cause of action and attempts to instruct the jury that the mere fact of

control over the pictures which they produced, constituted unreasonable restraint of trade. [424]

\* \* \* \* \*

Dated: August 15, 1956.

Respectfully submitted,

NEWLIN, TACKABURY &  
JOHNSTON,

/s/ By FRANK R. JOHNSTON,  
O'MELVENY & MYERS,

/s/ By HOMER I. MITCHELL,  
Attorneys for Defendants. [426]

Acknowledgment of Service Attached. [427]

[Endorsed]: Filed August 16, 1956.

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[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED ADDITIONAL  
AND SUBSTITUTED INSTRUCTIONS

Plaintiff's Proposed Jury Instruction No. 8B (to  
Be Substituted for Plaintiff's Instruction No.  
8A)

If you find that the defendants named in this case entered into the conspiracy charged or that such conspiracy included other corporations or individuals whom you find to have participated in such a conspiracy, then you are instructed that the acts, statements or conduct of each conspirator are chargeable to all of the conspirators. In law, conspirators are deemed to be the agents of each other in carrying out the purposes of the conspiracy.

Plaintiff's Proposed Instruction No. 20A

A proper way for plaintiff to establish the amount of the damage in this case is by showing on the basis of reasonable evidence what its theatre would have earned during the period September 1, 1950 to September 1, 1951 in the absence of the alleged conspiracy, and compare this result with the actual results incurred during this period. In this connection, plaintiff may compare its theatre with comparable theatres. As evidence of what the Paradise would have earned had it had access to a regular supply of feature pictures on Los Angeles first run, plaintiff has put in evidence the operating statements of the Loyola Theatre. If you find that in the absence of the conspiracy plaintiff would have operated on a Los Angeles first run, and if you further find that the Paradise Theatre and the Loyola Theatre are comparable, then you may consider the evidence and all other evidence in the record to ascertain the amount of damage, if any, suffered by the Paradise Theatre.

Plaintiff has also introduced evidence showing the operating statements of the Academy Theatre which operated on an availability of 7 days after Los Angeles first run closing. If you find that in the absence of conspiracy plaintiff would have operated regularly on an availability of 7 days after Los Angeles closing, and you further find that the Paradise Theatre and the Academy Theatre are comparable, then you may consider this evidence, together with all other evidence in ascertaining the

amount of damage, if any, suffered by the Paradise Theatre.

Under plaintiff's evidence on a so-called first run theory, the maximum damages which it may recover is \$. . . . .

Under plaintiff's evidence on a policy of exhibition of 7 days after Los Angeles first run closing, the maximum verdict which you may return is \$. . . . . [451]

Respectfully submitted,

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER. [452]

[Endorsed]: Filed August 17, 1956.

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[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM WITH REFERENCE TO CERTAIN SPECIFIED JURY INSTRUCTIONS WHICH ARE STILL OPEN AND WITH REFERENCE TO MODIFICATION OF CERTAIN INSTRUCTIONS

In Re Jury Instructions Proposed by the  
Defendants

Defendants' Proposed Jury Instruction No. 33:

This instruction is the one which states, in effect, that the burden is upon the plaintiff to prove by a preponderance of the evidence that substantial

competition did not exist between or among the theatres. The Court, at the hearing on August 17, 1956, requested that plaintiff consider this instruction and advise the Court of his position.

Since plaintiff, of course, has the burden to prove all of the issues in this case by a preponderance of the evidence, and since this would include issues involving "substantial competition", plaintiff does not object to this instruction. [455]

\* \* \* \* \*

[Endorsed]: Filed August 20, 1956.

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[Title of District Court and Cause.]

## PLAINTIFF'S PROPOSED MODIFIED AND SUPPLEMENTAL INSTRUCTIONS

Plaintiff's Instruction No. 6C Revised Pursuant to  
the Court's Request:

"It is not always necessary to find a specific intent with respect to a restraint of trade or a conspiracy to monopolize in order to find that the anti-trust laws have been violated. No conspirator in restraint of trade and no participant in a conspiracy to monopolize does so without being conscious of what he is doing.

"It is unlawful to foreclose competitors from any substantial market. The employment of a conspiracy to monopolize, to foreclose competition, to gain a competitive advantage or to destroy a competitor, is unlawful." [470]



Plaintiff's Proposed Instruction No. 10B Revised  
to Meet Objections of Defendants and Suggestion of Court:

"You are charged that it would be unlawful and a violation of the anti-trust laws for any group of corporations to conspire to monopolize the first run exhibition of motion pictures in the City of Los Angeles. It is unlawful to conspire to monopolize by conspiring to refuse to license pictures first run to any theatre other than those operated, managed and booked by other participants in the conspiracy to monopolize, or by conspiring to restrict the pictures which they would so license to outsiders to the pictures which the other participants found to be undesirable." [471]

Plaintiff's Proposed Jury Instruction No. 12A

You are instructed that it is unlawful under the Sherman Act for a distributor of motion pictures to grant an unreasonable clearance between two theatres. A clearance granted between two theatres which are not in substantial competition is unreasonable.

The word "clearance" means

"The period of time usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres."

The term "run" means

"The successive exhibitions of a motion picture in a given area, first run being the first exhibition in that area, second run being the next subsequent, etc."

U. S. vs. Paramount Pictures, Inc., et al., 334  
U. S. 131, 145; 92 L. ed. 1260, 1286.

If you find that the defendants granted clearance to the Academy, United Artists, Fox-Inglewood, Fifth Avenue Southside, La Tijera or Imperial Theatres over the Paradise Theatre, then with respect to the theatre receiving it, such clearance would be unlawful if that theatre was not in substantial competition with the Paradise Theatre.

Plaintiff's Proposed Instruction No. 13A, Revised  
to Meet the Objections of the Defendants:

"If you find that the defendants or any of them conspired to deprive the Paradise Theatre of pictures for exhibition on an availability of 7 days after Los Angeles first run closing, then such conspiracy may unreasonably restrain trade in violation of the anti-trust laws even though the Paradise Theatre and other theatres in the Inglewood-Westchester area were in substantial competition." [473]

The Court's Proposed Substitute for Defendants'  
Proposed Instruction No. 37, which Plaintiff  
Adopts and Hereby Proposes:

"The issue in this case is whether the sum total of the defendants' dealings with the Paradise Theatre resulted in an unreasonable restraint of competition. If what the defendants did, did not unreasonably restrain competition, the fact that they may have acted in concert would not establish a violation of the anti-trust law.

"It is the law that if the purpose of a combina-

tion is to carry out a conspiracy to monopolize, a restraint otherwise reasonable, may be unlawful."

Plaintiff's Proposed Modification of Defendants' Instruction No. 55:

"In determining whether the acts of the defendants caused any injuries to plaintiff's Paradise Theatre, you are entitled to take into consideration plaintiff's claim that it was not in substantial competition with other theatres in the Inglewood-Westchester area. If you find that the Paradise Theatre was not in substantial competition with such theatres, you may then consider whether it would or would not have lost any substantial or significant amount of the patronage by reason of the fact that it sometimes played pictures later than other theatres in the area." (Modification is portion underlined in the second sentence of this instruction.) [475]

Respectfully submitted,

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,

Attorneys for Plaintiff. [476]

Acknowledgment of Service Attached. [477]

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

## MEMORANDUM RE JURY INSTRUCTIONS

\* \* \* \* \* [486]

Defendants' Instruction No. 29C

(To be given only if No. 29A is not given.)

In considering the changes which have been made in distribution practices since 1950 and 1951, you are instructed that if such changes are as consistent with an honest effort to keep up with changing conditions as with the prior existence of a conspiracy, they would not form any basis for an inference of conspiracy. [493]

Acknowledgment of Service Attached. [494]

[Endorsed]: Filed August 21, 1956.

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[Title of District Court and Cause.]

## PLAINTIFF'S PROPOSED INSTRUCTION TO JURY No. 37C

Plaintiff's Proposed Instruction to Jury No. 37C

There has been mentioned in this case a number of other cases. These include the decision of this Court in the Partmar Case and a decision in the Baldwin Case. Other cases have also been mentioned.

You are instructed that you are to decide this case upon the facts of this case only. You are not bound by any finding of fact in any other case, including the Partmar Case or any other case that has been mentioned. This case should be decided

by you upon all the facts and the evidence and under these instructions. [496]

Respectfully submitted,

ELWOOD S. KENDRICK,  
JACK ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,

/s/ By JACK CORINBLIT,  
Attorneys for Plaintiff. [497]

Acknowledgment of Service Attached. [498]  
[Endorsed]: Filed Aug. 23, 1956.

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#### NOTE FROM JURY—No. 1

The large map of theaters in the L. A. Metropolitan area.

Exhibit 46A bid letters. [499]

[Endorsed]: Filed August 23, 1956.

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#### NOTE FROM JURY—No. 2

(1) Bid letters 1950-1951.

(2) Pink office memo read by Mr. Mitchell over Mr. Kornbitt's objection.

(3) Mr. Cupper's letter read over Mr. Mitchell's objection and they stipulated as to Mr. Ball's testimony.

(4) Mr. Schreiber's letters to distributors asking for first run and seven day run. [501]

[Endorsed]: Filed August 23, 1956.



NOTE FROM JURY

Judge Westover:

Could we please have the bid forms showing amount each exhibitor bid during this period 1950-1951. [503]

[Endorsed]: Filed August 27, 1956.

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NOTE FROM JURY

Please ask Judge Westover—if he will read the last several pages of Mr. Merriott's testimony. Also Mr. Hickey's testimony when Mr. Kornblitt read his deposition to the effect he knew there was some sort of a deal the way pictures were awarded.

[Endorsed]: Filed August 27, 1956.

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[Title of District Court and Cause.]

INTERROGATORY No. 2

During the period from September 18, 1950, to September 17, 1951, were Fox West Coast Theatres Corporation, Twentieth Century-Fox Film Corporation, Loew's Incorporated, or any of them, engaged in a conspiracy with each other to monopolize or unreasonably restrain interstate commerce in the licensing of motion pictures to plaintiff for exhibition in the Inglewood-Westchester area on a 7-day run?

Yes: Yes.

No:.....

Dated: Los Angeles, California, August 28, 1956.

/s/ DOROTHY WOODFORD,  
Foreman of the Jury. [507]

[Endorsed]: Filed August 28, 1956.

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[Title of District Court and Cause.]

INTERROGATORY No. 1

During the period from September 18, 1950, to September 17, 1951, were Fox West Coast Theatres Corporation, National Theatres Corporation, Twentieth Century-Fox Film Corporation, Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation, Paramount Pictures Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Universal Corporation, and Universal Film Exchanges, Inc., or any of them, engaged in a conspiracy with each other to monopolize or unreasonably restrain interstate commerce in the licensing of motion pictures for exhibition on Los Angeles first run?

Yes:.....

No: No.

Dated: Los Angeles, California, August 28, 1956.

/s/ DOROTHY WOODFORD,  
Foreman of the Jury. [508]

[Endorsed]: Filed August 28, 1956.

[Title of District Court and Cause.]

## VERDICT

We, the Jury in the above entitled cause, find in favor of the plaintiff, Paradise Theatre Building Corporation, and assess damages against the defendants, Fox West Coast Theatres Corporation, Twentieth Century-Fox Film Corporation, Loew's Incorporated, in the sum of Twenty Thousand Dollars (\$20,000).

Dated: Los Angeles, California, August 28, 1956.

/s/ DOROTHY WOODFORD,  
Foreman of the Jury. [509]

[Endorsed]: Filed August 28, 1956.

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[Title of District Court and Cause.]

## MOTION TO SET ASIDE VERDICT AND TO ENTER JUDGMENT IN ACCORDANCE WITH MOTION FOR A DIRECTED VER- DICT

Defendant Loew's Incorporated moves the Court, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, to set aside the jury verdict against Loew's Incorporated received on August 28, 1956, and to enter judgment in favor of Loew's Incorporated in accordance with its motion for a directed verdict which was made at the close of all the evidence and taken under submission by the Court.

Said motion is made upon each and all of the following grounds: [510]

1. There is no substantial evidence to support said verdict.

2. There is no evidence that the requirement of competitive bidding for a single 7 day run in the Inglewood-Westchester area was the result of a conspiracy between Loew's, Twentieth Century-Fox and Fox West Coast.

3. The requirement of competitive bidding for a single 7 day run in the Inglewood-Westchester area, even if by agreement, is not an unreasonable restraint of trade.

4. There is no substantial evidence of lack of substantial competition between the Paradise Theatre and the La Tijera, Fox Inglewood, United Artists, Academy and Fifth Avenue theatres against which the Paradise Theatre was required to bid.

5. The agreement for division of product in the Inglewood area, prior to May 1, 1950, does not constitute substantial evidence to support said verdict because:

(a) Such agreement was lawful;

(b) Such agreement is not one of the conspiratorial acts charged in the complaint and is, therefore, not within the issues;

(c) The evidence is uncontradicted that said agreement was not in effect after May 1, 1950;

(d) There was no injury to the Paradise Theatre, in any event, since it had an opportunity to bid for all Loew's pictures on the 7 day run. [511]

6. There is no evidence of what damage was

caused by any alleged conspiracy between Loew's, Inc., Twentieth Century-Fox and Fox West Coast with respect to the licensing of motion pictures to plaintiff on a 7 day run.

7. The conspiracy found by the jury as to three defendants is not the conspiracy alleged and tried as to ten defendants.

Dated: August 31, 1956.

Respectfully submitted,

O'MELVENY & MYERS,

/s/ By HOMER I. MITCHELL,

Attorneys for Defendant Loew's  
Incorporated. [512]

Acknowledgment of Service Attached. [513]

[Endorsed]: Filed August 31, 1956.

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[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND TO  
HAVE JUDGMENT ENTERED IN AC-  
CORDANCE WITH MOTION FOR DI-  
RECTED VERDICT

Defendants Twentieth Century-Fox Film Corporation and Fox West Coast Theatres Corporation, and each of them, pursuant to Rule 50(b) F.R.C.P. hereby move that the court set aside the verdict of the jury herein rendered on August 28, 1956, and to enter judgment in favor of said defendants in accordance with said defendants' motion for directed verdict heretofore made herein on August



17, 1956 upon the grounds stated at said time and on the following specific grounds:

1. That as a matter of law a verdict against only three defendants out of ten alleged to have participated in a conspiracy [514] must be set aside under the pleadings and proof adduced herein.

2. That there was no evidence adduced of damage resulting to plaintiff from any asserted conspiracy participated in only by Twentieth Century-Fox Film Corporation, Fox West Coast Theatres Corporation and Loew's Incorporated, and further that no damage could have resulted from such asserted conspiracy for the reason that the jury found no conspiratorial deprivation of product to the plaintiff by defendants Warner's, Paramount and Universal, and no claim of conspiratorial deprivation of product has been asserted with respect to United Artists, Columbia, RKO, Republic, Lippert, Eagle Lion, Allied Artists, Monogram and Film Classics.

3. That the evidence is insufficient to support a verdict in plaintiff's favor.

4. That there is no evidence that defendants Twentieth Century-Fox Film Corporation and Fox West Coast Theatres Corporation, or either of them, participated in a conspiracy in unreasonable restraint of trade or to monopolize resulting in damage to plaintiff for the period from September, 1950, through September, 1951.

5. That there is no evidence connecting defendants Twentieth Century-Fox Film Corporation or Fox West Coast Theatres Corporation, or either of

them, with any combination or conspiracy with defendant Loew's Incorporated to unreasonably restrain or monopolize the distribution or exhibition of feature motion pictures in the Inglewood-Westchester area on a seven-day run from September, 1950, through September, 1951.

6. That there is no evidence of the fact of legally recoverable damage to plaintiff caused by defendants Twentieth Century-Fox Film Corporation or Fox West Coast Theatres Corporation, or either of them.

7. That there is no legally sufficient evidence of the amount of damage. That the amount of damage was based upon [515] conjecture and speculation.

Respectfully submitted,

NEWLIN, HOLLEY, TACKABURY  
& JOHNSTON,

/s/ By FRANK R. JOHNSTON,

Attorneys for Defendants Twentieth Century-Fox  
Film Corporation, National Theatres Corpora-  
tion and Fox West Coast Theatres Corpora-  
tion. [516]

[Endorsed]: Filed August 31, 1956.

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[Title of District Court and Cause.]

PETITION RE AWARD OF ATTORNEYS'  
FEES AND AFFIDAVIT OF JACK COR-  
INBLIT IN SUPPORT THEREOF

Petition is hereby made by plaintiff in the above-

entitled action for an award of reasonable attorneys' fees as provided in 15 U.S.C.A., Section 15.

In support of said petition, there is attached hereto an Affidavit of Jack Corinblit, Esq., and there is filed herewith an Affidavit of Elwood S. Kendrick, Esq., two of the attorneys in the above entitled action. This petition is based upon these affidavits and upon all of the files and records in said action.

Respectfully submitted,

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,  
/s/ By JACK CORINBLIT,  
Attorneys for Plaintiff. [517]

### Affidavit of Jack Corinblit

State of California

County of Los Angeles—ss.

Jack Corinblit, being duly sworn, deposes and says as follows:

1. I am one of the attorneys of record in the above entitled action; since January 1, 1956, I have been familiar with the proceedings taken in connection therewith.

2. I hold the degree of Doctor of Laws from the Law School of the University of Chicago. Since 1951, I have been engaged almost exclusively in legal work in the specialized field of the Sherman

Act and Clayton Act, and particularly in connection with anti-trust cases brought under these statutes in connection with the motion picture industry.

3. In connection with these specialized legal services, I have been engaged as one of the principal attorneys representing the plaintiffs in approximately fifteen cases, all brought before this Honorable Court.

4. In this action, from January 1, 1956, I was charged with the primary responsibility of preparation of this case for trial. During the period from January 1, 1956 to February 23, 1956, and from April 5, 1956 to July 9, 1956, I spent substantially all of my time in preparation of the above entitled case for trial. This preparation included interviewing witnesses, examination of records of the plaintiff and all of the defendants, collecting exhibits, the taking of depositions, and the conferences with witnesses and officers of the plaintiff corporation in preparation for the trial.

I attended as attorney for plaintiff the depositions of fourteen witnesses on 39 separate days as indicated below: [518]

February 13, 14, 15, 16, 21, 23, 1956—Deposition of Alex Schreiber.

April 9, 10, 11, 1956—Deposition of Max Schreiber.

April 11, 1956—Deposition of Harry Rackin.

April 26, 27, 1956—Deposition of Marco Wolff.

May 3, 1956—Deposition of Sidney Lehman.

May 8, 9, 1956—Deposition of Alex Schreiber.

May 10, 1956—Deposition of Sydney Lehman.

May 15, 16, 1956—Deposition of Alex Schreiber.

May 17, 1956—Deposition of Sidney Lehman.

May 18, 21, 23, 1956—Deposition of Alex Schreiber.

May 24, 1956—Deposition of Sydney Lehman.

May 25, 28, 1956—Deposition of Alex Schreiber.

June 6, 1956—Deposition of Sydney Lehman.

June 6, 1956—Deposition of Alex Schreiber.

June 9, 1956—Deposition of Sydney Lehman.

June 15, 1956—Deposition of Alfred Taylor.

June 20, 1956—Deposition of George Hickey.

June 21, 1956—Deposition of Fred Greenberg.

June 25, 26, 1956—Deposition of John Bertero.

June 28, 1956—Deposition of William Marriott.

June 28, 1956—Deposition of Irving Epstein.

June 29, 1956—Deposition of Edwin Zable.

July 3, 1956—Deposition of Morris Sudmin.

July 5, 1956—Deposition of Bert Pirosh.

July 6, 1956—Deposition of George Bowser.

The foregoing depositions covered 2968 pages of transcript.

5. The total number of hours spent by me in preparation of this case for trial was in excess of 550 hours.

6. The trial of this action commenced on July



10, 1956 and was completed by the return of a verdict by the jury on August 28, 1956, covering a period of 30 trial days.

7. My associate in the trial of this case, Dan Herscher, Esq., participated in the trial of this case for the entire 30 trial days.

8. A reasonable hourly rate for the 550 hours of services rendered in connection with the preparation of this case for trial is \$40.00 per hour, or a total of \$22,000. A reasonable hourly rate for the 240 hours of services rendered by Elwood S. Kendrick, Esq. in connection with the preparation of this case for trial is \$40.00 per hour, or a total of \$9600.00. A reasonable daily rate for the 30 days of trial services by your affiant is \$250 per day, or a total of \$7500.00; and a reasonable daily rate for the 30 days of trial services by Dan Herscher, Esq., is \$125.00 per day, or a total of \$3750.00.

Wherefore, your affiant prays an award of reasonable attorneys' [520] fees in the above entitled case in the amount of \$42,850.00.

/s/ JACK CORINBLIT,  
Affiant.

Subscribed and Sworn to before me this 31st day of August, 1956.

[Seal] /s/ ROBERT S. MORRIS,  
Notary Public in and for said County and State.

Acknowledgment of Service Attached. [522]

[Endorsed]: Filed August 31, 1956.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S  
PETITION FOR ATTORNEYS' FEES

State of California

County of Los Angeles—ss.

Elwood S. Kendrick, being duly sworn, deposes and says:

1. That he is a graduate of the University of Illinois, College of Law, and received the Degree of L.L.B. from said University in June of 1937.

2. That he is a Member of the Bar of the States of Illinois and California, several of the U. S. District Courts located in said States, the Court of Appeals for the Ninth Circuit, and the U. S. Supreme Court.

3. That during the period from 1943 to 1949 he was employed in a substantial number of actions in several of the United States District Courts, involving Anti-Trust issues.

4. That during the period from 1948 through date, he has [551] been associated as Co-Counsel with Joseph Alioto, of the San Francisco Bar, in a number of actions involving Anti-Trust issues.

5. That since March of 1951, through date, he has been Counsel in several actions involving the motion picture industry.

6. That during the period from January 1, 1949 through date, he has maintained offices in the General Petroleum Building, located at 612 South

Flower Street, Los Angeles 17, California, specializing in patent, trademark and anti-trust law.

7. That records in his office indicate that his work on the instant action, together with that of Joseph L. Alioto, as shown by the attached affidavit, is in excess of two hundred forty (240) hours. That, more particularly, his records show that in preparing the Complaint in this instant action and assembling data thereon, he worked, in the preparation of this action, on the following dates: 3/30/51, 4/12/51, 4/13/51, 4/15/51, 4/17/51, 4/18/51, 4/19/51, 4/25/51, 4/28/51, 4/29/51, 6/15/51, 7/2/51, 7/3/51, 7/5/51, 7/6/51, 7/9/51, 7/13/51, 7/30/51, 9/12/51, 9/13/51, 1/3/52, 1/10/52, 1/23/52, 1/24/52, 2/4/52, 2/8/52, 2/11/52, 2/14/52, 2/19/52, 2/26/52, 2/27/52, 3/3/52, 3/14/52, 3/28/52, 4/16/52, 5/29/52, 6/2/52, 6/11/52, 6/13/52, 6/24/52, 6/25/52, 7/10/52, 7/8/52, 7/18/52, 7/21/52, 8/12/52, 8/13/52, 8/14/52, 8/15/52.

That he had long distance telephone conferences with Mr. Alioto on 3/29/51, 3/30/51, 4/6/51, 4/10/51, 4/16/51, 4/20/51, 6/7/51, 6/11/51, 6/12/51, 6/27/51, 6/29/51, 7/7/51, 7/18/51, 7/24/51, 7/31/51, 9/4/51, 9/10/51, 9/25/51, 10/17/51, 10/22/51, 11/19/51, 12/7/51, 12/10/51, 12/29/51, 1/23/52, 2/8/52, 4/18/52, 4/28/52, 5/9/52, 5/14/52, 5/29/52, 6/10/52, 6/13/52, and 7/17/52.

That his time in the preparation as aforesaid was 116 $\frac{1}{4}$  hours.

That during the period from January 1, 1956, through date, in conferences with Mr. Corinblit, Mr. Schreiber, Mr. Alioto and [552] Mr. Lehman, and in review of files and documents and other

matters relating to the prosecution of this action, affiant has spent in excess of 27 hours.

That as will be noted from the foregoing, affiant's time prior to January 1, 1956 was 116 $\frac{1}{4}$  hours, and that affiant's time since that date was 27 hours, or a total of 143 $\frac{1}{4}$  hours.

That as shown in the affidavit attached hereto, affiant's co-counsel, Joseph L. Alioto, has spent in excess of 100 hours; thus, affiant and Alioto have spent in excess of 240 hours on this matter.

Respectfully submitted,

/s/ ELWOOD S. KENDRICK,  
Of Counsel for Plaintiff.

Subscribed and sworn to before me this 13th day of September, 1956.

[Seal]     /s/ A. DONALD STOLZY,

Notary Public in and for the County of Los Angeles, State of California. My Commission Expires January 3, 1960. [553]

[Title of District Court and Cause.]

# AFFIDAVIT OF JOSEPH L. ALIOTO IN SUPPORT OF PLAINTIFF'S PETITION FOR ATTORNEYS' FEES

State of California

City and County of San Francisco—ss.

Joseph L. Alioto, being first duly sworn, deposes and says:

That he has been an attorney at law specializing in practice in the Federal Courts since December 10, 1940. That he has had sixteen years experience

in antitrust litigation. That he commenced representing the plaintiff in February of 1951 in connection with its claim of discrimination against certain motion picture distributors, and that in the preparation of the complaint and preparation of the trial, he has expended approximately 112 hours.

/s/ JOSEPH L. ALIOTO

Subscribed and sworn to before me this 12th day of September, 1956.

[Seal] /s/ PHYLLIS KNORR,  
Notary Public in and for the above county and state. My commission expires 1-6-57. [554]

Certificate of Service by Mail attached.

[Endorsed]: Filed September 21, 1956. [555]

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In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 13476-HW

PARADISE THEATRE BUILDING CORPO-  
RATION, Plaintiff,

vs.

FOX WEST COAST THEATRES CORPORA-  
TION, et al., Defendants.

### JUDGMENT

The above entitled action having come on for trial on July 10, 1956, the Court, upon motion of the defendants having directed the entry of an



order dismissing defendant United Artists Corporation; the above entitled action having been tried by jury and submitted to said jury for decision on August 23, 1956, and the jury having rendered its verdict on August 28, 1956 for plaintiff and against defendants Twentieth Century-Fox Film Corporation, Fox West Coast Theatres Corporation and Loew's Incorporated; and the jury having further rendered its verdict against plaintiff and in favor of defendants Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, National Theatres Corporation, Universal Corporation and Universal Film Exchanges, Inc.; [556]

It is, Therefore, Ordered, Adjudged and Decreed by the Court as Follows:

1. That the plaintiff have and recover of and from the defendants Twentieth Century Fox Film Corporation, Fox West Coast Theatres Corporation and Loew's, Incorporated, the sum of \$60,000.00, plus the sum of \$10,000.00 as reasonable attorneys' fees, and the sum of \$1,657.69 for costs herein to be taxed in the usual course.

2. That plaintiff take nothing from defendants Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, National Theatres Corporation, Universal Corporation and Universal Film Exchanges, Inc., and that said defendants take nothing as their costs herein.

3. That the complaint in this action against defendant United Artists Corporation, be, and it hereby is, dismissed.

Dated this 24th day of September, 1956.

HARRY C. WESTOVER,  
Judge. [557]

Disapproved as to form:

O'MELVENY & MYERS,  
/s/ By HOMER I. MITCHELL,

Attorneys for defendants Loew's, Inc., Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Universal Corporation and Universal Film Exchanges, Inc.

Disapproved as to form:

NEWLIN, HOLLEY, TACKABURY  
& JOHNSTON,  
/s/ By FRANK R. JOHNSTON,

Attorneys for defendants Twentieth Century-Fox Film Corporation, National Theatres Corporation and Fox West Coast Theatres Corporation.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Lodged August 31, 1956. Filed,  
Docketed and Entered September 24, 1956.

[Title of District Court and Cause.]

### MEMORANDUM

In the above entitled action the jury rendered a verdict for plaintiff against defendants Twentieth Century-Fox Film Corporation, Fox West Coast Theatres Corporation and Loew's Incorporated and further rendered its verdict against plaintiff and in favor of defendants Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, National Theatres Corporation, Universal Corporation and Universal Film Exchanges, Inc. [559]

Twentieth Century-Fox Film Corporation, Fox West Coast Theatres Corporation and Loew's Incorporated, defendants against whom the verdict was rendered, immediately moved for judgment notwithstanding the verdict upon the ground of fatal variance between the verdict returned and the conspiracy alleged in the complaint. In its complaint plaintiff alleged a conspiracy in which all defendants participated. According to the jury's verdict only three defendants participated in a conspiracy.

The leading case on this subject appears to be *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 176 F. 2d 594, in which the Court points out that the question is not whether the conspiracy found is consistent with the conspiracy alleged, but rather whether the conspiracy found is consistent with the evidence in the case.

We are of the opinion that the verdict rendered in the case at bar is consistent with the evidence.

The moving defendants also content there is no evidence to show damage inflicted upon plaintiff by them. The question of conspiracy and the question of damages were questions of fact fairly submitted to the jury for determination. The jury found a conspiracy and determined there was damage as a result thereof. We do not believe the Court should substitute its opinion as to conspiracy and damages in lieu and in stead of the jury's findings. We are also of the opinion that there is evidence in the record from which the jury could determine there was a conspiracy involving the three moving defendants and that damage resulted.

Under the mandate of the law, the amount found by the jury must be trebled and, in addition, the Court must award to plaintiff reasonable attorneys' fees and costs. [560]

Moving defendants contend there should be an allotment of attorney fees and costs among all defendants and that defendants who prevailed should be entitled to recover their costs from plaintiff. According to the moving defendants, the propriety of apportionment of costs which they suggest is supported squarely by *American Box Mach. Co. v. Crosman*, 57 Fed. 1029 (C.C. Mass., 1893). Upon Shepardizing this case, the Court finds it has been mentioned seldom since 1893 and then not with reference to cost apportionment.

As the case at bar was tried in the United States District Court in California, in the absence of any



Federal authority the Court should follow California law. The right of prevailing defendants to receive costs has been decided in *Naify v. Pacific Indemnity Company*, 11 C. 2d 5 (1938), in which the Supreme Court of California said, at page 13:

“All defendants were, however, properly joined in the action in an attempt to discover which was liable for plaintiff’s claims; and since all denied and contested plaintiffs’ rights of recovery under the policy, none should recover costs.”

Under the authority of the foregoing case, this Court rules that those defendants absolved from the conspiracy by the jury’s verdict are not entitled to costs.

However, two conspiracies were alleged in the complaint—a conspiracy relative to first-run Los Angeles and a conspiracy relative to seven-day-run Inglewood-Westchester area. No attempt was made in the complaint to allege two, separate causes of action, and at the trial no attempt was made to segregate testimony relative to first-run Los Angeles and seven-day-run Inglewood-Westchester. In fact, [561] all witnesses testified indiscriminately as to the entire procedure concerning distribution in the areas involved, and it is not now possible to ascertain with exactitude how much time was spent by plaintiffs in attempting to establish a conspiracy first-run Los Angeles. Moving defendants contend that as a great portion of plaintiff’s case was devoted to the first-run Los Angeles conspiracy phase of the case defendants should not be



called upon to pay attorney fees and costs involved in attempting to establish such a conspiracy.

In several similar actions filed in this court plaintiffs have attempted to establish conspiracies first-run in Los Angeles. Invariably plaintiffs' attempts have been unsuccessful. (*Partmar v. Paramount*, 97 F. S. 552; 200 F. 2d 561, *Metropolitan Theatres Corp. v. Loew's Incorporated*, Southern District of California No. 13,115, and *Fanchon & Marco v. Paramount Pictures*, 100 F. S. 84; 215 F. 2d 167). Plaintiff and plaintiff's attorneys had knowledge of the unsuccessful attempts of prior litigants to establish a conspiracy first-run Los Angeles. It would seem unjust to require the moving defendants in this case to pay that portion of attorney fees and costs attributable to the first-run phase of the case. This Court is of the opinion that at least half of counsels' time and effort was used in attempting to establish a first-run conspiracy in Los Angeles.

In a prior case (*C. L. James v. Twentieth Century-Fox Film Corporation*, No. 12,976-HW)—in which the jury returned a verdict of \$1,000—this Court awarded attorney fees of \$15,000. The case at bar was longer in trial and was avidly contested. We are of the opinion that a reasonable fee for counsel would be the sum of \$20,000. [562]

In the *James* case, *supra*, the Court in its endeavor to ascertain a fair and just figure as attorney fees inquired of defendants' counsel their fees in the action; and in the case at bar the Court invited defense counsel to advise it of their charges

made to the individual defendants, as the Court felt a comparable allowance should be made to plaintiff's counsel. However, the Court has not been afforded the advantage of the requested information.

As attorney fees in this case the Court anticipated an allowance of \$20,000. Because of the time and effort given by plaintiff in attempting to establish the first-run Los Angeles conspiracy the Court is of the opinion the attorney fees and costs which ordinarily would be assessed should be divided in half.

Wherefore, It Is Ordered:

1. That plaintiff have judgment against defendants Twentieth Century-Fox Film Corporation, Fox West Coast Theatres Corporation and Loew's Incorporated in the sum of \$60,000;

2. That plaintiff have judgment in the amount of \$10,000 as reasonable attorney fees, plus one-half of the costs expended in this litigation.

Dated: September 24, 1956.

/s/ HARRY C. WESTOVER,

United States District Judge. [563]

[Endorsed]: Filed September 24, 1956.

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[Title of District Court and Cause.]

### MINUTES OF THE COURT

Date: September 24, 1956. At: Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge.

Deputy Clerk: Mary O. Smith. Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendants: No appearance.

The motions of defendants Twentieth Century-Fox Film Corp., Fox West Coast Theatres and Loew's, Incorporated, filed August 31, 1956, for Judgment for Directed Verdict, having been heretofore heard and submitted, and the Court having duly considered the pleadings, record and briefs of counsel, and the law applicable,

It Is Ordered that the motions are denied, counsel for plaintiff to prepare formal order. Counsel notified.

The petition for attorney fees filed by plaintiff on August 31, 1956, having been submitted, the Court now hands down its Memorandum that plaintiff have judgment against the defendants Twentieth Century-Fox Film Corp., Fox West Coast Theatres and Loew's Incorporated in the amount of \$60,000.00, and further plaintiff have judgment in the amount of \$10,000.00 as reasonable attorney fees, plus one-half of the costs expended in the litigation. Fld Memorandum. Two copies of Memorandum given to Frank R. Johnston, Attorney for Twentieth Century-Fox. Mailed copy to counsel for plaintiff.

JOHN A. CHILDRESS,

Clerk. [564]

HW—9/24/56.

[Title of District Court and Cause.]

### NOTICE OF REQUEST TO TAX COSTS

To Defendants Loew's, Inc., 20th Century Fox Film Corporation and Fox West Coast Theatres Corporation, and to their attorneys of record:

Please Take Notice that judgment having been entered in the above entitled action on the 24th day of September, 1956 against Loew's, Inc., 20th Century Fox Film Corporation, and Fox West Coast Theatres Corporation, the Clerk is requested to tax as costs one-half of the items set forth on the schedule of costs attached in accordance with said judgment. The undersigned will appear before the Clerk to tax said costs on October 1, 1956 at 11:00 a.m.

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,

/s/ By JACK CORINBLIT,

Attorneys for Plaintiff. [565]

### AFFIDAVIT OF JACK CORINBLIT

State of California

County of Los Angeles—ss.

Jack Corinblit being duly sworn deposes and says:

That he does hereby swear that the foregoing costs set forth in the Schedule of Costs attached hereto are correct and were necessarily incurred in

this action, and that the services for which fees have been charged were actually and necessarily performed.

Further affiant sayeth not.

/s/ JACK CORINBLIT,  
Affiant.

Subscribed and sworn to before me this 27th day of September, 1956.

[Seal] /s/ V. KLENZING,  
Notary Public in and for said County and State.

#### SCHEDULE OF COSTS

1. To U. S. Clerk—Filing fee, \$15.00 (allowed).
2. To U. S. Marshal—Service of summons and complaint, \$12.00 (allowed).
3. Docket fee pursuant to 28 U.S.C.A., Section 1923, \$20.00 (allowed).
4. To Fred Quail, Court Reporter, for deposition taken by defendants: (a) Deposition of Alex Schreiber, copy, \$527.70; (b) Deposition of Max Schreiber, copy, \$152.85; (c) Deposition of Syd Lehman, copy, \$218.70; (d) Deposition of Marco Wolff, copy, \$68.55; [567] (e) Deposition of Harry Rackin, copy, \$7.80; (f) Deposition of Seymour Simon (Chicago, to Court Reporter Herbert Lawrence), copy, \$52.17. (Disallowed; custom of court not to allow copies.)
5. To Conlee - Wren & Bedall for depositions taken by plaintiff: (a) Al Taylor, George Hickey, Fred Greenberg, John Bertero, William Marriott,



Irving Epstein, Edwin Zabel, Morris Sudmin, Bert Pirosh, George Bowser. Total cost—original of each deposition, \$634.90 (allowed). One copy of each deposition (disallowed; custom of court not to allow copies).

6. Witnesses: (a) Spiro Skouras, witness fee for trial, mileage and service; (b) Richard Carnegie, witness fee for deposition and service; (c) Ralph Clark, witness fee for deposition and service; (d) Wayne Ball, witness fee for deposition and service. (Disallowed; non-attendance, Sec. 28, USC 1821). [568]

7. To Rapid Blue Print—Photos of documents introduced in evidence, \$20.00 (allowed; originals not used at request of defendants).

8. To Wilcox Photo Supply—Photostats of documents introduced in evidence, \$287.83 (allowed for reason above).

9. To Spence Photos—Photographs in evidence, \$6.00 (allowed as cost of 8x10 print; enlargement for convenience, not necessity).

10. To S. J. Trainer—For Reporter's transcript of trial July 9, 1956 through August 28, 1956—original and one copy, \$2,308.20 (allowed by stipulation).

11. To Spence Photos—Two photos in evidence, \$11.44 (allowed).

12. To Joseph Youtan, Accountant—Expert witness fee re testimony on damages (disallowed; contrary to custom of court to allow expert fees).

Total—\$3,315.37.

Costs are hereby taxed in the amount of \$1,657.69,

this 1st day of October, 1956, being one-half of the above taxed amount, and that amount included in the judgment.

/s/ JOHN A. CHILDRESS,  
Clerk.

Present: Jack Corinblit, for plaintiff; Philip F. Westbrook, Jr., for certain defendants; Frank R. Johnston, for certain defendants. [569]

Adding machine tape attached.

Acknowledgment of Service attached. [570]

[Endorsed]: Filed September 27, 1956.

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL; NOTICE OF SAID MOTION

Defendants Loew's Incorporated, Twentieth Century-Fox Film Corporation and Fox West Coast Theatres Corporation, and each of them, move the court, pursuant to Rule 59A of the Federal Rules of Civil Procedure, to vacate as to them the judgment entered herein on September 24, 1956, to set aside as to them the jury verdict received on August 28, 1956, and to grant to them [571] a new trial limited to issues relating to plaintiff's claim that during the period from September 18, 1950 to September 17, 1951 said defendants engaged in a conspiracy with each other to monopolize or unreasonably restrain interstate commerce in the licensing of motion pictures to plaintiff for exhibi-

tion in the Inglewood-Westchester area on an availability of 7 days after Los Angeles first run closing. Said motion is made upon the ground that said jury verdict was against the weight of the evidence with respect to said claim. Said motion is based upon all of the records, files and pleadings in this action and upon the memorandum in support of said motion served and filed concurrently herewith.

Dated October 4, 1956.

Respectfully submitted,

NEWLIN, TACKABURY &  
JOHNSTON,

/s/ By FRANK R. JOHNSTON,

Attorneys for Defendants Twentieth Century-Fox  
Film Corporation and Fox West Coast Thea-  
tres Corporation.

O'MELVENY & MYERS,

/s/ By HOMER I. MITCHELL,

Attorneys for Defendant Loew's  
Incorporated.

To Plaintiff and Its Attorneys of Record Herein:

Please Take Notice that the above motion will be brought on for hearing before the above entitled Court, in the Courtroom [572] of the Honorable Harry C. Westover, Judge, United States Post Office and Courthouse Building, Los Angeles, California, on Monday, October 15, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard.

Dated October 4, 1956.

NEWLIN, TACKABURY &  
JOHNSTON,

/s/ By FRANK R. JOHNSTON,

Attorneys for Defendants Twentieth Century-Fox  
Film Corporation and Fox West Coast Thea-  
tres Corporation.

O'MELVENY & MYERS,

/s/ By HOMER I. MITCHELL,

Attorneys for Defendant Loew's  
Incorporated. [573]

Affidavit of Service by Mail Attached. [574]

[Endorsed]: Filed October 4, 1956.

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[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO  
RETAX COSTS

To Defendants Loew's, Inc., 20th Century Fox  
Film Corporation and Fox West Coast Thea-  
tres Corporation, and to their attorneys of  
record:

Please Take Notice that on Monday, October 15,  
1956, in the Courtroom of the Honorable Harry C.  
Westover, Judge, of the United States District  
Court, for the Southern District of California,  
Southern Division, plaintiff will move the Court  
for an order retaxing the costs allowed by the clerk  
as follows:

1. Plaintiff will move for an order allowing the sum of \$1,027.77 for copies of depositions taken by defendants, which sum was disallowed by the Clerk.

2. For an order allowing the sum of \$181.40 for copies of depositions taken by plaintiff, which sum was disallowed by the Clerk.

3. For an order allowing the sum of \$500.00 for expert [608] witness fee of Joseph Youtan, which sum was disallowed by the Clerk.

Said motion will be based upon the Notice of Request to Tax Costs in all of the other files and papers in this action.

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,  
/s/ By JACK CORINBLIT,

Attorneys for Plaintiff. [609]

[Endorsed]: Filed October 5, 1956.



[Title of District Court and Cause.]

ORDER DENYING MOTIONS OF DEFENDANTS LOEW'S, INC., 20TH CENTURY FOX FILM CORPORATION AND FOX WEST COAST THEATRES CORPORATION FOR A DIRECTED VERDICT AND ORDER DENYING THE MOTIONS OF SAID DEFENDANTS TO SET ASIDE VERDICT AND ENTER JUDGMENT IN ACCORDANCE WITH SAID MOTIONS FOR A DIRECTED VERDICT

Defendants 20th Century Fox Film Corporation, Fox West Coast Theatres Corporation and Loew's, Inc. having moved for a directed verdict; the court having taken said motions under submission; the jury having rendered its verdict for plaintiff and against said defendants; said defendants having moved the court to set aside the verdict of the jury and to enter a judgment in accordance with said defendants' motions for a directed verdict; the court having heard oral argument on said motions and having considered said oral argument, and the briefs submitted by plaintiff and said defendants with respect to said motions,

It Is Hereby Ordered, that each of said motions be, and they are hereby, denied. [610]

Dated this 8th day of October, 1956.

/s/ HARRY C. WESTOVER,  
Judge. [611]

Disapproved as to form.

O'MELVENY & MYERS,  
/s/ By P. F. WESTBROOK,  
Attorneys for Loew's, Inc.

Disapproved as to form.

NEWLIN, TACKABURY &  
JOHNSTON,  
/s/ By FRANK R. JOHNSTON,  
Attorneys for defendants 20th Century Fox Film  
Corp. and Fox West Coast Theatres Corp.

[Endorsed]: Lodged September 27, 1956. Filed  
October 8, 1956.

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[Title of District Court and Cause.]

ORDER DENYING PLAINTIFF'S MOTION  
TO RETAX COSTS

The plaintiff having filed its Notice to Tax Costs before the Clerk; the Clerk having allowed certain items as costs as requested by plaintiff, including the cost of original depositions taken by plaintiff, and having disallowed certain items; the plaintiff having moved the court for an order retaxing costs and the court having, on the 15th day of October, 1956, heard and considered the matter;

It Is Hereby Ordered as follows:

1. The sum of \$1,027.77 for copies of depositions taken by defendants is disallowed to plaintiff.
2. The sum of \$181.40 for copies of depositions taken by plaintiff is disallowed to plaintiff. [631]

3. The sum of \$500.00 for expert witness fee of Joseph Youtan is disallowed to plaintiff.

4. Plaintiff's said Motion to Retax Costs is denied in its entirety.

Dated: This 19th day of October, 1956.

/s/ HARRY C. WESTOVER,  
Judge

Approved as to form.

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,

/s/ By JACK CORINBLIT,  
Attorneys for Plaintiff. [632]

[Endorsed]: Filed October 19, 1956.

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[Title of District Court and Cause.]

## MINUTES OF THE COURT

Date: October 19, 1956. At: Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge; Deputy Clerk: Mary O. Smith; Reporter: None. Counsel for Plaintiff: No appearance. Counsel for Defendants: No appearance.

Proceedings: The motion of defendants 20th Century - Fox, Fox West Coast Theatres, and Loew's Inc., filed October 4, 1956, for new trial, having been heretofore heard and submitted, and the Court having duly considered the pleadings and the law

applicable, and being fully advised in the premises now hands down its Ruling on Motion for New Trial and orders same filed, and in accordance therewith orders said motion for new trial denied.

Filed Ruling. Mailed copies to counsel.

JOHN A. CHILDRESS,  
Clerk. [633]

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[Title of District Court and Cause.]

### RULING ON MOTION FOR NEW TRIAL

After the jury had returned its verdict in favor of plaintiffs in this action defendants against whom the verdict was rendered made a motion for judgment notwithstanding the verdict. Upon hearing the motion, the Court held there was evidence in the record from which the jury could conclude that a conspiracy existed.

After judgment had been entered, the same defendants made a motion for new trial. Upon this motion they now urge it is necessary that the Court consider the weight of the evidence and that it is not sufficient to find there is evidence in the record from which a jury could have [634] concluded a conspiracy existed.

The leading case in this Circuit seems to be *Southern Pacific Co. v. Guthrie*, 186 F. 2d 926, in which the Court states that the verdict is to be set aside and a new trial granted when the trial court "is of the opinion the verdict is against the weight

of evidence." In a footnote, the Court sets out the rule as follows:

"On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. \* \* \*"

In a Supplemental Memorandum in support of the motion for a new trial, the moving defendants cite as authority the case of *Garrison v. United States*, 62 F. 2d 41, in which the Court says:

"\* \* \* Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice."

We are of the opinion that the verdict rendered in this case is not contrary to the clear weight of evidence, and it is not necessary to set aside the verdict in order to prevent a miscarriage of justice.

Motion for new trial denied.

Dated: October 19, 1956.

/s/ HARRY C. WESTOVER,

United States District Judge. [635]

[Endorsed]: Filed October 19, 1956.



[Title of District Court and Cause.]

STIPULATION AND ORDER FOR DIS-  
MISSAL OF CLAIM FOR EQUITABLE  
RELIEF

It Is Hereby Stipulated by and between plaintiff  
and defendants herein, by and through their re-  
spective attorneys of record, that plaintiff's claim  
for equitable relief be and it hereby is dismissed.

Dated: October 15, 1956.

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,

/s/ By JACK CORINBLIT,

Attorneys for Plaintiff. [636]

O'MELVENY & MYERS,  
HOMER I. MITCHELL,  
PHILIP F. WESTBROOK, JR.,  
CHARLES G. BAKALY, JR.

/s/ By HOMER I. MITCHELL,

Attorneys for Defendants, Warner Bros. Pictures  
Inc., Warner Bros. Pictures Distributing Cor-  
poration, Paramount Pictures Inc., Paramount  
Film Distributing Corporation, Loew's Incor-  
porated, Universal Pictures Company, Inc.,  
Universal Film Exchanges, Inc.

NEWLIN, TACKABURY &  
JOHNSTON,  
FRANK R. JOHNSTON,

/s/ By FRANK R. JOHNSTON,  
Attorneys for Defendants Twentieth Century-Fox  
Film Corporation, National Theatres Corpora-  
tion, Fox West Coast Theatres Corporation.

It Is So Ordered, this 19th day of October, 1956.

/s/ HARRY C. WESTOVER,  
Judge. [637]

[Endorsed]: Docketed, Entered and Filed Octo-  
ber 19, 1956.

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[Title of District Court and Cause.]

## ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL

Defendants Twentieth Century-Fox Film Corpo-  
ration, Fox West Coast Theatres Corporation, and  
Loew's, Inc., having moved the Court, jointly and  
severally, for a new trial herein upon the ground  
that the verdict of the jury was contrary to the  
weight of the evidence; plaintiff having appeared  
in opposition to said motion and the parties having  
filed memoranda pertaining thereto; the Court hav-  
ing heard oral argument, having considered [638]  
the memoranda and oral argument, and having  
weighed the evidence submitted in the case; and  
the Court having found that the verdict rendered  
in this case is not contrary to the clear weight of  
the evidence and that it is not necessary to set  
aside the verdict in order to prevent a miscarriage  
of justice;

It is hereby ordered that said motion of said defendants be and it hereby is denied.

Dated this 24th day of October, 1956.

/s/ HARRY C. WESTOVER,  
Judge. [639]

Affidavit of Service by Mail Attached. [640]  
[Endorsed]: Filed October 24, 1956.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that defendants Fox West Coast Theatres Corporation, Twentieth Century-Fox Film Corporation and Loew's Incorporated and each of them hereby appeal to the United States Court of Appeals for the Ninth Circuit from the [641] final judgment entered in this action on September 24, 1956, in favor of plaintiff and against said defendants.

Dated: October 29, 1956.

NEWLIN, TACKABURY &  
JOHNSTON,

/s/ By FRANK R. JOHNSTON,  
Attorneys for Defendants, Twentieth Century-Fox Film Corporation and Fox West Coast Theatres Corporation.

O'MELVENY & MYERS,  
/s/ By HOMER I. MITCHELL,  
Attorneys for Defendant Loew's  
Incorporated. [642]

[Endorsed]: Filed October 29, 1956.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff Paradise Theatre Building Corporation hereby appeals to the United States Court of Appeals for the Ninth Circuit those parts of the final judgment entered in this action on September 24, 1956 which awarded to plaintiff from defendants Loews Incorporated, Twentieth Century Fox Film Corporation and Fox West Coast Theatres Corporation the sum of \$10,-000.00 as reasonable attorneys' fees and the sum of \$1657.69 as costs.

Dated: November 23, 1956.

JACK CORINBLIT,  
ELWOOD KENDRICK,  
JOSEPH ALIOTO,

/s/ By JACK CORINBLIT [645]

[Endorsed]: Filed November 23, 1956.

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[Title of District Court and Cause.]

### STIPULATION AND ORDER EXTENDING TIME WITHIN WHICH TO DOCKET RECORD ON APPEAL

Whereas, there was filed a Notice of Appeal by the defendants Fox West Coast Theatres Corporation, Twentieth Century-Fox Film Corporation and Loew's Incorporated on October 29, 1956, and

Whereas, the Clerk of the Court has indicated that said record will not be ready for docketing

within 40 days from the date of the filing of the Notice of Appeal. [649]

Now, Therefore, It Is Stipulated by and between the parties, through their respective counsel, as follows:

1. That the time within which the Record on Appeal shall be filed and docketed with the United States Court of Appeals for the Ninth Circuit shall be extended to January 25, 1957.

NEWLIN, TACKABURY &  
JOHNSTON,

/s/ By FRANK R. JOHNSTON,  
Attorneys for Defendants Twentieth Century-Fox  
Film Corporation and Fox West Coast Thea-  
tres Corporation.

O'MELVENY & MYERS,  
/s/ By HOMER I. MITCHELL,  
Attorneys for Defendant Loew's  
Incorporated

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,  
/s/ By JACK CORINBLIT,  
Attorneys for Plaintiff

It Is So Ordered this 4th day of December, 1956.

/s/ HARRY C. WESTOVER,  
Judge. [650]

[Endorsed]: Filed December 4, 1956.



[Title of District Court and Cause.]

STIPULATION AND ORDER RE RECORD  
ON APPEAL AND TRANSMITTAL OF  
ORIGINAL EXHIBITS

Whereas, defendants Fox West Coast Theatres Corporation, Twentieth Century-Fox Film Corporation and Loew's Incorporated have heretofore filed their notice of appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 24, 1956, in favor of plaintiff and against said defendants, and have heretofore filed their designation of contents of the record on appeal, [651] designating the complete record and all the proceedings and evidence in the above entitled action, including the reporter's transcript of the evidence and proceedings therein,

And Whereas, plaintiff has heretofore filed its notice of appeal from so much of said judgment as awards the sum of \$10,000.00 as reasonable attorneys' fees and the sum of \$1,657.69 for costs,

It Is Hereby Stipulated, by and between plaintiff and said defendants, by and through their respective attorneys of record, as follows:

1. For the purposes of said appeals, the following shall constitute the complete record and all the proceedings and evidence in the action within the provisions of Rule 75(d) of the Federal Rules of Civil Procedure:

(a) The entire reporter's transcript, consisting of pages 1 to 3880 inclusive.

(b) All exhibits received in evidence.

(c) Plaintiff's Exhibits 32 A-1, 32 A-2, 32 A-3, 32 A-4, 32 B, 33 A, 33 B, 33 C, 35 A, 44 A, 44 B, 44 C, 44 D, 44 E, 44 F, 44 G, 44 H, 44 I, 44 J, 44 K-1, 44 K-2, 44 K-3, 44 L, 44 M, 44 N-1, 44 N-2, 44 N-3, 44 N-4, 44 N-5, 44 N-6, 44 N-7, 44 O-1, 44 O-2, 44 O-3, 44 P-1, 44 P-2, 44 P-3, 44 Q-1, 44 Q-2, 44 Q-3, and 44 Q-4 marked for identification only.

(d) The documents listed in Exhibit A, attached hereto and made a part hereof.

2. The originals of all documents, including exhibits [652] shall be transmitted by the Clerk to said Court of Appeals, in lieu of copies thereof.

Dated: This 2nd day of January, 1957.

ELWOOD S. KENDRICK,  
JOSEPH ALIOTO,  
JACK CORINBLIT,  
DAN HERSCHER,

/s/ By JACK CORINBLIT,  
Attorneys for Plaintiff

NEWLIN, TACKABURY &  
JOHNSTON,

/s/ By HUDSON B. COX,  
Attorneys for Defendants Twentieth Century-Fox  
Film Corporation and Fox West Coast Thea-  
tres Corporation.

O'MELVENY & MYERS,  
/s/ By HOMER I. MITCHELL,  
Attorneys for Defendant Loew's  
Incorporated

It Is So Ordered this 2nd day of January, 1957.

/s/ HARRY C. WESTOVER,

Judge [653]

Exhibit A Attached—List of Documents.

[Endorsed]: Filed January 2, 1957.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 661, inclusive, contain the original:

Affidavit in Support of plaintiff's petition for attorneys' fees;

Answer of Fox West Coast Theatres Corp., et al., to the First Amended Complaint;

Answer of Loew's Inc.;

Answer of Paramount Pictures, Inc., et al.;

Answer of Universal Pictures Co., Inc., et al.;

Defendants' Notice of Appeal;

Defendants' Designation of Contents of Record on Appeal;

Plaintiff's Notice of Appeal;

Stipulation and Order Res Supersedeas Bond;

Stipulation and Order Extending Time Within Which to Docket Record on Appeal;

Stipulation and Order re record on and Transmittal of Original Exhibits on Appeal;

Complaint;

First Amended Complaint;

Motion to Retax Costs;

Order Denying Motion to Retax Costs;

Defendants' proposed form of Interrogatories to Jury and of Verdict Under Rule 49(b);

Interrogatories Nos. 1 and 2;

Judgment;

Defendants' Additional and Revised Jury Instructions;

Defendants' Proposed Jury Instructions;

Defendants' Additional, Proposed Revised and Supplemental Instructions;

Plaintiff's Proposed Instruction No. 37-C;

Plaintiff's proposed, modified and supplemental instructions;

Plaintiff's proposed instructions;

Plaintiff's proposed, additional and substituted instructions;

Plaintiff's proposed supplemental instructions;

Plaintiff's memorandum re instructions;

Plaintiff's Instruction No. 2-A;

Three Notes from Jury;

One Note from Jury;

Defendants' objections to Instructions;

Plaintiff's objections to Instructions;

Objections to Defendants' Proposed Instructions Nos. 12 and 48;

Plaintiff's objections to Designated Instructions;

Memorandum of the Court filed 9/24/56;

Memorandum of Law by defendant Loew's Inc.;

Memorandum support motion by defendants 20th Century Fox et al.;

Memorandum respect to Motion for Directed Verdict;

Memorandum re offer and Treatment of U. S. v. Paramount;

Memorandum in opposition to plaintiff's proposal to introduce testimony;

Memorandum re relationship between United Artists Theatre Circuit and Joseph Schenck and the case at bar;

Memorandum in opposition to motion to strike from plaintiff's opening statement;

Motion for more definite statement;

Motion to set aside Verdict of Jury;

Motion to set aside verdict and enter judgment;

Names and addresses of attorneys;

Memorandum in support of motion for new trial;

Motion for new trial;

Order denying motion for new trial;

Ruling on motion for new trial;

Supplemental memorandum in support of motion of new trial;

Notice to tax costs;

Offer of proof and memoranda of law by plaintiffs re admissibility of evidence;

Objections to plaintiff's proposed opening statement;

Plaintiff's proposed opening statement;

Defendants 20th Century Fox et al. proposed opening statement;

Defendants Warner Bros. Proposed Opening Statement;

Order denying motions of Defendants Loew's Inc., et al. for a Directed Verdict, etc.

Petition re Award of Attorneys' Fees;



Defendants' Pretrial Memorandum of Law;

Stipulation and order for dismissal of claim for equitable relief;

Stipulation and order putting motion off calendar;

Verdict;

and a full, true and correct copy of the Minutes of the Court on July 9, 1956; August 23, 1956; August 24, 1956; August 27, 1956; August 28, 1956; August 31, 1956; September 24, 1956; October 15, 1956; and October 19, 1956;

which, together with all of the Original of both Plaintiff and Defendants' Exhibits both admitted in evidence and marked for identification only, and thirty (30) volumes of Reporter's Transcripts, of proceedings had on *Kime* 8, 1956; July 9, 1956; July 10, 1956; July 11, 1956; July 12, 1956; July 13, 1956; July 17, 1956; July 18, 1956; July 19, 1956; July 20, 1956; July 24, 1956; July 25, 1956; July 26, 1956; July 27, 1956; July 31, 1956; August 1, 1956; August 2, 1956; August 3, 1956; August 7, 1956; August 8, 1956; August 9, 1956; August 10, 1956; August 14, 1956; August 15, 1956; August 16, 1956; August 17, 1956; August 21, 1956; August 22, 1956; August 23, 1956; August 23, 24, 27, 28, 1956; August 31, 1956;

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the

foregoing record amount to \$2.40, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 24th day of January, 1957.

[Seal] JOHN A. CHILDRESS,

Clerk

/s/ EDWARD F. DREW,

Chief Deputy

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In the United States District Court, Southern  
District of California, Central Division

No. 13476-HW Civil

PARADISE THEATRE BUILDING CORPO-  
RATION, Plaintiff,

vs.

FOX WEST COAST THEATRES CORPORA-  
TION, et al., Defendants.

REPORTERS' TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California  
Wednesday, July 11, 1956

Honorable Harry C. Westover, Judge Presiding.

Appearances: For the Plaintiff: Jack Corinblit,  
Esq., and Dan Herscher, Esq., 250 North Hope  
Street, Los Angeles, California.

For the Defendants Warner Bros. Pictures, Inc.,  
Warner Bros. Pictures Distributing Corporation,

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Universal Pictures Company, and Universal Film Exchanges, Inc.: O'Melveny & Myers, by Homer I. Mitchell, Esq., Philip F. Westbrook, Jr., Esq., Charles G. Bakaly, Jr., Esq.

For the Defendants Twentieth Century-Fox Film Corporation, National Theatres Corporation, and Fox West Coast Theatres Corporation: Newlin, Tackabury & Johnston, by Frank R. Johnston, Esq., and David Massey, Esq.

\* \* \* \* \*

Mr. Mitchell: Now, the plaintiff makes a great point of an arrangement between the exhibitors in the area prior to the opening of the Paradise Theatre. [144]\*

There was an arrangement, apparently, between the exhibitors in the area prior to the opening of the Paradise whereby La Tijera, Bill Cupper's theatre, licensed Warners and RKO products.

The United Artist Theatre in downtown Inglewood licensed Loew's.

The Academy Theatre licensed Paramount products.

There may have been other arrangements there, but at least we know about those.

This arrangement, the evidence will show, was terminated at the request of Bill Cupper long before the Paradise ever came into being, namely, in April 1950.

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.

So far as the arrangement itself is concerned, exhibitors, like distributors, have a right to select the people with whom they will deal. The distributors have a right to select their customers.

The exhibitors have a right to select their customers.

Bullock's selects Hickey-Freeman clothes for men. Nobody else sells Hickey-Freeman clothes in Los Angeles. If you want a Hickey-Freeman suit you have to go to Bullock's to buy it.

Harris & Frank sells Society Brand clothes.

Desmond's sells Kuppenheimer and Silverwood's sells Hart, Schaffner & Marx.

There is nothing unusual about one company selling the [145] product of a particular manufacturer nor is there anything unusual about the arrangement which these exhibitors made whereby the Warner pictures were played in the La Tijera and Imperial Theatres and the United Artist Theatre played Loew's and Academy played Paramount.

The only thing that the Paradise could complain of—the only thing Paradise did complain of, or does complain of, is that they were squeezed out. The evidence will show it was not squeezed out.

This arrangement had terminated long before the Paradise came into being.

At the time Paradise came into being there was then and had been for many months vigorous bidding in the area and we will show you that invitations to bid were sent to all these theatres; that numerous of them made and we will show you how the pictures were awarded. There will be no uni-

formity of awarding of Warner pictures to La Tijera, Loew's, to United Artist. There was vigorous bidding resulting in pictures going first here and going there.

Paradise couldn't have been hurt by it for two reasons. In the first place there wasn't any arrangement in existence at the time the Paradise opened and in the second place, if it had been in existence all the Paradise had to do was offer a higher bid and the picture would have been there.

So, actually such an arrangement couldn't operate except [146] by agreement of all the interested theatres.

Since the Paradise came in and wanted to bid they were given the opportunity. They had the same opportunity as any other theatre in the area.

Their real trouble was that they, unfortunately, they built before the area was ready for their theatre. \* \* \* \* \* [147]

Now, there are a number of red herrings counsel tries to drag into this case which really have nothing to do with it. I have already told you about the arrangement in Inglewood for the dividing up and the arrangement among the exhibitors for the dividing up of the right to play product, which arrangement, right or wrong, we don't have to decide that now, was not even in existence when the Paradise was in operation and hadn't been in existence for many months prior thereto.

He brings up some negotiations with Mr. Joseph Schenck. Mr. Schenck was one of the operators of the United Artists Theatre Circuit. This negotia-



tion took place long prior to the construction of the Paradise Theatre, long prior to the period covered by the allegations of the complaint, and you may hear nothing more of it. It has nothing to do with the licensing of pictures. It doesn't involve Paramount, Loew's, Warner or Universal in any way.

Another subject matter which plaintiff will like to talk about is the transfer of the United Artists Theatre Circuit operation by Fox West Coast to operation by United Artists Theatre Circuit at the end of 1949 or early 1950. That has nothing to do with Warner, Paramount, Loew's or Universal. It has nothing to do with this case at all, and perhaps you will hear no more about that. [153]

\* \* \* \* \*

#### EDWIN F. ZABEL

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: You may be seated. Please state your name.

The Witness: Edwin F. Zabel.

The Clerk: How do you spell your last name?

The Witness: Z-a-b-e-l.

#### Direct Examination

Q. (By Mr. Corinblit): Mr. Zabel, by whom are you employed?

A. By Fox West Coast Agency Co., Inc.

Q. That company is a wholly-owned subsidiary

(Testimony of Edwin F. Zabel.)

of the defendant Fox West Coast Theatres Corporation, is that correct?      A. Yes.

Q. How long have you been employed by that company?      A. Approximately 30 years.

Q. Did you perform services over the last 30 years for that company as well as for Fox West Coast Theatres Corporation, the defendant?

A. I happened to be employed by that particular company at the present time, but Fox West Coast or National Theatres, one or the other are subsidiaries. [168]

Q. Will you speak up a little bit so the jury can hear you, please?

A. I was employed, we say Fox West Coast Theatres. It may cover different corporations. I have been employed by several different corporations, subsidiary corporations of that company.

Q. You were employed by the defendant National Theatres Corporation for many years, were you not?      A. Yes, sir.

Q. That covered a period of time, let us say, from 1935 to 1951?      A. Approximately, yes.

Q. You were also employed by the wholly-owned subsidiary of that company, National Theatres Amusement Company, Inc., is that right?

A. Yes.

Q. Will you tell the jury, please, what your duties were with respect to these corporations and their theatre interests in 1949, 1950 and 1951?

A. In 1949 and 1951 I was employed as head

(Testimony of Edwin F. Zabel.)

of the buying department, film buying department, of Fox West Coast Theatres.

Q. What did you do for National Theatres Amusement Company, Inc.?

A. Well, at times I would—if they had some problems, [169] I would try to help them out, work for some of them, for National Theatres. [170]

Q. Now, National Theatres Amusement Company, Inc., is the company that was responsible for doing the buying or advising on the buying for the National Theatre chain, is that right?

A. Yes.

Q. And Fox West Coast Theatre Agency is the company that operated the theatres for Fox West Coast Theatres on the Pacific Coast generally, is that right? A. Yes.

Mr. Corinblit: May I have Exhibit 31-J-1 and 31-J-2?

(Document handed to Mr. Corinblit.)

Q. (By Mr. Corinblit): I will show you a document which has been marked——

Mr. Johnston: May we look at them for just one moment, please?

Mr. Corinblit: Yes.

(Document handed to Mr. Johnston.)

Mr. Johnston: Thank you.

Q. (By Mr. Corinblit): I will show you, Mr. Zabel, Plaintiff's Exhibit 31-J.

The Court: For identification.

Q. (By Mr. Corinblit): For identification. And ask you if you are familiar with—if you have seen

(Testimony of Edwin F. Zabel.)

these documents before? There are several documents stapled together so you might examine all of them. [171]

A. I think I have seen them.

Q. You recognize them to be the agreements between Fox West Coast Agency Corporation and National Agency Corporation pursuant to which National Theatre Amusement Company, Inc., performed services for the local Pacific Coast chain of Fox West Coast Theatres.

A. Performed services for all the subsidiaries.

Q. Including the local chain?             A. Yes.

Mr. Corinblit: We will offer in evidence Plaintiff's Exhibit 31-J.

Mr. Johnston: Your Honor, I am going to object to these documents on the ground they are incompetent, irrelevant and immaterial, relating to a time period, as the court will see—I think one of the documents is dated 1935 and one 1938 and one 1944.

The Court: Well, supposing they had had an agreement in 1935 relative to buying and that agreement continued over until 1950.

Mr. Johnston: I don't know that it did, your Honor.

The Court: We have to start somewhere. You can't put in the whole case at one time.

Mr. Johnston: I appreciate that, but we could start in 1900. We have got to stop at some place.

The Court: Objection overruled. Received in evidence. [172]



(Testimony of Edwin F. Zabel.)

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 31-J-1.)

The Court: I think I might advise the jury at this time, that we have a number of defendants in this case. There is Warners, Paramount, Fox West Coast and Fox.

During the examination of some of these witnesses the probabilities are that an exception will be made, for instance by Paramount, relative to certain testimony offered concerning Fox.

The court will probably admit the evidence as to Fox and not admit it as to Paramount, so it is going to be necessary for you to keep in mind these various legal entities.

This witness is an employee of Fox. His statements may be binding as to Fox, but may not be binding as to Paramount unless Paramount participated in the conversations or participated in the dealings in some way.

So, you must remember that as far as this witness is concerned he is only speaking for Fox. There has been no testimony so far connecting him with any other of the defendants.

Mr. Mitchell: You mentioned the fact there might be an objection. As I understand it from the proceedings had prior to the calling of the jury it is understood that a general objection made by the various counsel as to any matters involving the defendants other than those — for instance, with [173] respect to Mr. Zabel's statements as to Fox



(Testimony of Edwin F. Zabel.)

West Coast, they are not admissible against Paramount, Loew's, Universal, or Warners.

The Court: That is true, Mr. Mitchell, but I think we ought to get it into this record.

Mr. Mitchell: Yes.

The Court: We should get it into the record so somebody reading the record hereafter will understand that that was the agreement.

Mr. Mitchell: That is why I am stating it at this time. The objection runs to all statements that do not involve my client.

The Court: I might say to the jury that we have a rule in law known as the hearsay rule. That is, nobody is bound by any conversation unless he participates in that conversation or unless he was present where he could overhear it.

So, if there was a conversation taking place between A and B, C is not bound by it unless C was present or participated or could hear it. Consequently, you must remember that these conversations that will be testified to will only be binding upon those who participated in them or who was close enough to have heard what was going on.

Also, there is an understanding between counsel and court that testimony not binding upon those who were not present and who were not a part of the transaction will not [174] be binding on those who did not participate.

Mr. Corinblit: That is unless it is tied into them later on.

The Court: I may raise the bar at some place

(Testimony of Edwin F. Zabel.)

in this case and tell you that this testimony is admissible as to all defendants. [175]

\* \* \* \* \*

The Court: You have used the terms buying and booking. I think we better get a definition. I understand the term and you understand and so does counsel. I doubt if the jury ever heard of these terms before, buying and booking.

Will you explain to the jury what you mean by buying and booking and what is the difference?

The Witness: Buying and booking are words we use in the licensing of motion pictures. At times we just have what we call the buyers. They make the deal for the pictures, and the bookers put the dates into the theatre.

But today buying and booking is practically the same thing. Everybody buys and books, because if you buy a picture at a time, and it is too much work for one group to [178] do it, and then put it into the theatre. It is rather a complex proposition and a little hard work, but that is the cause.

When you license a picture for a theatre from a distributor, you almost book it at the same time today, or at least within a short time.

Years ago they used to buy pictures by the year and then book them at a later date, but today things have changed and during the period we are talking about they had changed to where you may have to bid for a picture and you don't know whether you are going to get it or not until the last minute sometimes. So today you practically

(Testimony of Edwin F. Zabel.)

buy and book at the same time, and that is exactly what it is, licensing a picture and allocating it to the theatre you buy it for.

The Court: By booking you mean putting the picture into the particular theatre.

The Witness: Yes, sir.

The Court: You book it.

The Witness: Yes, sir.

The Court: You place it into the particular theatre.

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Corinblit): Mr. Zabel, I will show you Plaintiff's Exhibit 31-E for identification, and ask you if that document reflects the list of theatres for which you were [179] responsible for buying in 1950.

A. I was the head of the department that were buying for this—what we call the booking and buying department.

Q. These were the theatres, in part, at least, for which you were responsible?

A. According to this list, I imagine they were, because it is evidently a copy—I don't know whether we had all of these theatres at that time or not, but I would say substantially that we perhaps did.

Mr. Corinblit: We will offer Plaintiff's Exhibit 31-E in evidence, your Honor.

Mr. Johnston: Your Honor, I am going to object to this as being a document that is totally im-

(Testimony of Edwin F. Zabel.)

material as now constituted. It includes theatres in many other areas than the area we are now concerned with.

The Court: Will you stipulate how many theatres were in the Fox West Coast chain? You can stipulate as to that, can't you?

Mr. Johnston: I think we can, but I say it is immaterial how many theatres were in the Fox West Coast chain.

The Court: I think they want to establish that the Fox West Coast chain was a big chain.

Mr. Johnston: I will stipulate to that. I will stipulate it was large and operated many theatres.

The Court: What do you mean by many? 200 or 300? [180]

Mr. Johnston: I think, subject to correction by Mr. John Bertero or some other witness, perhaps in the Southern California area there were at this time, I would say roughly around 150 theatres.

The Court: In Southern California?

Mr. Johnston: That's right.

The Court: How many were in Los Angeles and in the Los Angeles area?

Mr. Johnston: I would rather have a witness testify to that.

The Court: Here is the list here.

Mr. Johnston: This is the list of theatres in San Francisco, San Luis Obispo, and other places. I take it that that has no part of our deliberations.

The Court: I am willing to agree it has no part here except to show the number of theatres.



(Testimony of Edwin F. Zabel.)

Mr. Johnston: I will take the list and count them. I will be very happy to do that.

The Court: All right. I will sustain the objection provided you will get together and prepare a statement showing the number of theatres.

Mr. Johnston: In what area, sir?

The Court: In the Fox West Coast chain, the number, and the number in the metropolitan area.

Mr. Johnston: The Los Angeles metropolitan area? [181]

The Court: Los Angeles metropolitan area.

Mr. Johnston: We will be glad to do that.

Q. (By Mr. Corinblit): Mr. Zabel, in addition to the theatres on the list I showed you, I think you testified you were responsible for the department, and the contracts that went in referred to the department that covered the entire National Theatres chain. This was part of the National Theatres chain.

Can you give me roughly how many theatres you were responsible for in total?

Mr. Johnston: Your Honor, I again say that that is immaterial.

The Court: Overruled.

The Witness: I was not responsible for all the theatres in the chain, in the National Theatres chain in that department.

The Court: The question is how many were you responsible for.

The Witness: This is 1950?

Mr. Corinblit: Yes.



(Testimony of Edwin F. Zabel.)

The Court: Approximately.

The Witness: Approximately 225.

Q. (By Mr. Corinblit): Mr. Zabel, you were employed by National Theatres Amusement Company at that time, is that right? [182]

A. I don't know for sure. I was changed from National Theatres Amusement Company to Fox West Coast Agency some time around that period.

Q. But when you were employed by National Theatres Amusement Company, Inc., you acted as an advisor to all the subsidiaries throughout the country, is that right?

A. As an advisor, yes.

Q. I want to know when you acted in that capacity as advisor, what was the total number, approximately, of theatres?

A. I would say around 550.

Q. Among the theatres that you supervised in 1949, 1950 and 1951, in the Los Angeles territory, are some that I want you to identify, if you will.

In the Los Angeles area, looking first to the first run theatres in the city of Los Angeles——

Mr. Westbrook: Counsel, are you going to use the blackboard?

Mr. Corinblit: Yes.

Mr. Westbrook: You are?

Mr. Corinblit: In a moment.

Mr. Westbrook: Will you move it back so we can see?

Mr. Corinblit: Surely.

Q. You supervised the purchase of pictures on

(Testimony of Edwin F. Zabel.)

first run for the Grauman's Chinese Theatre on Hollywood Boulevard, is [183] that correct?

A. Yes.

Q. And in 1949, the Egyptian Theatre on Hollywood Boulevard, is that right?

A. I don't remember what year.

Q. 1949, prior to November?

A. I don't know. At one time we did supervise the Egyptian Theatre.

Q. The Vogue Theatre on Hollywood Boulevard?

A. Yes.

Q. The Iris Theatre on Hollywood Boulevard?

A. Yes. This is 1949?

Q. Yes. The Guild Theatre on Hollywood Boulevard?

Mr. Mitchell: You Honor, I will object to the questions on the basis of 1949. That is prior to the time there was any Paradise Theatre, and it is prior to the time covered by the complaint. The complaint alleges a conspiracy between September 17, 1950, and September 17, 1951. Who owned the theatres in 1949 is immaterial.

The Court: Overruled.

Q. (By Mr. Corinblit): The Guild Theatre on Hollywood Boulevard?

A. I don't know whether the Guild was operated in 1949 or not. It was a television theatre for a while.

Q. When it was open, you supervised it? [184]

A. Yes.

Q. Now, on first run you supervised in 1949 the

(Testimony of Edwin F. Zabel.)

purchase for the Fox first run theatre at the Loew's State, is that right, in 1949?

A. I don't know. It was some time. I don't remember the date.

Q. Prior to that date?

A. Yes, prior to that date.

Q. And for the Los Angeles Theatre downtown, is that right? A. Yes.

Q. Now, turning for a moment to the Wilshire Boulevard area, you supervised the purchase of pictures for the Wilshire Theatre?

A. Fox Wilshire?

Q. Yes. A. Yes.

Q. And the El Rey Theatre? A. Yes.

Q. And the Ritz Theatre? A. Yes.

Q. And the Four Star prior to its turn back?

A. Prior to United Artists taking it.

Q. Is that correct, the Four Star?

A. Yes. [185]

Q. And also the Uptown Theatre, is that correct? A. Yes.

Q. Now, during that same period in a supervisory capacity, you purchased pictures for the Studio Theatre in Studio City? A. Yes, sir.

Q. Also for the Culver Theatre in Culver City?

A. Yes.

Q. And also for the Loyola Theatre in Westchester? A. Yes.

Q. Now, those were generally the first run theatres which you supervised.

In the Inglewood-Westchester area in 1949 you

(Testimony of Edwin F. Zabel.)

supervised the purchase of film for the Academy Theatre, is that right? A. Yes.

Q. The Fifth Avenue Theatre? A. Yes.

Q. At that time the United Artists Theatre?

A. I don't know whether we were running the United Artists at that time or not.

Q. Prior to the turn back.

A. Prior to the turn back.

Q. The Fox Inglewood or the Inglewood Theatre? A. Yes. [186]

Q. The theatre called the Fox Crest?

Mr. Westbrook: Counsel, there is an error on the theatre map. The Fox Inglewood is the Fox Crest on the map and the Inglewood is the Inglewood Theatre.

Q. (By Mr. Corinblit): You supervised both theatres?

A. I don't think there was a Crest in Inglewood.

Q. Mr. Westbrook has corrected it. There were two theatres, one the Fox Inglewood and the other the Inglewood.

A. That's right, Fox Inglewood.

Q. Did you supervise both theatres?

A. Yes.

Q. Then you mentioned the Loyola Theatre.

In carrying out your duties of supervising the purchase of film for these first run theatres, it was your job to make arrangements with the film companies to obtain film product on first run, is that right?

(Testimony of Edwin F. Zabel.)

A. Either my job on some subordinates working for me.

Q. But under you? A. Yes.

The Court: May I ask a question here?

Mr. Corinblit: Yes.

The Court: During this period, 1949, 1950 and 1951, did you have a policy of multiple first run theatres in the Fox chain in Los Angeles?

The Witness: Yes, I believe we did. [187]

The Court: All the first-run theatres were on a par with them regardless of locations.

The Witness: That is they were on——

The Court: They were on a par, for instance the theatres out in Westwood, were on a par with downtown.

The Witness: No, no, we do not have a first-run theatre in Westwood.

The Court: If you had a first-run theatre in Inglewood was it on a par with the first-run theatre in downtown Los Angeles?

The Witness: No, the Inglewood theatres ran after the first-run theatre downtown.

The Court: Well, I thought you said these were all first-run theatres.

The Witness: I didn't understand that. I said that——

Mr. Johnston: The witness didn't say that, your Honor. I think Mr. Corinblit tried to infer that, but that isn't the fact at all.

Mr. Corinblit: No, sir, no.



(Testimony of Edwin F. Zabel.)

The Court: All the question was, did you supervise these theatres?

Mr. Johnston: That is right.

The Court: I thought you were talking about first run.

Mr. Corinblit: Other than the theatres that we mentioned, other than the Academy, the Fifth Avenue, United Artist, [188] Inglewood Fox, Inglewood. The theatres other than that group in Inglewood were Los Angeles first-run theatres, isn't that right? Those that I enumerated.

The Witness: I have forgotten the list of them now.

Q. (By Mr. Corinblit): Well, you remember the theatres in Hollywood. They were included—Loew's State, Egyptian, the Vogue, the Iris and the Guild, those were first-run theatres.

A. I don't remember the Guild as being a first-run theatre at that time or not. At one time it was.

Q. With that exception at one time it was.

A. Those theatres were first run, played first-run pictures.

Q. Now, downtown the Loew's State and the Los Angeles, is that true?

A. I believe at that time they were first run.

Q. And Wilshire Boulevard, the Wilshire Theatre, the Ritz, the Four Star, the El Rey.

A. The El Rey I don't believe was a first run at any time. The other three were first run.

Q. Part of the time it was first run.

A. I believe so, hit and miss, yes.

(Testimony of Edwin F. Zabel.)

Q. And the Uptown Theatre.

A. I believe Uptown was first run at that time.

Q. And the Studio Theatre in Studio City. [189]

A. Only—well, it was first run for a period of time. I don't remember whether it covered that time or not.

Q. And the Culver Theatre in Culver City.

A. It was a first run for a short period of time.

Q. Do you remember what that period of time was? A. No, I don't.

Q. As much as five years?

A. I don't recall. I wouldn't want to state.

Q. And then of course the Loyola Theatre which was first run from 1946 on.

A. I believe from the time that it opened.

Q. Now, the other theatres that I mentioned, the Academy, the Fifth Avenue, United Artist Inglewood, Inglewood Fox—in the Inglewood area, they were not first run Los Angeles, were they?

A. I don't recall playing any first-run pictures in those theatres.

The Court: I want to go back to my question about first-run pictures. Were they on a par with each other regardless of location? Were they on a par?

The Witness: The same picture played in some of the theatres, yes.

The Court: And the Loyola Theatre was on a par with the other first-run theatres?

The Witness: I don't understand what you mean by "par." [190]

(Testimony of Edwin F. Zabel.)

The Court: As far as getting first-run pictures was concerned.

The Witness: Yes. The same picture played in that that played in the other.

The Court: Did you play the same picture in all these first-run theatres simultaneously?

The Witness: No, only in a number of them.

The Court: But you considered the Loyola Theatre as a good first run theatre.

(No answer.)

The Court: That is as far as playing the picture was concerned, not revenue, but playing the picture was concerned.

The Witness: The physical setup of the theatre was very good, yes.

The Court: Well, these pictures were on a par—you didn't try to distinguish between first class and second class first-run theatres, did you?

The Witness: No.

The Court: They were all on a par.

The Witness: They were first-run theatres, yes. [191]

\* \* \* \* \*

#### Direct Examination—(Continued)

Q. (By Mr. Corinblit): Mr. Zabel, before the recess you had enumerated the Fox first run theatres and the court had asked you some questions about them.

Now, I think we should get in the record at this time, and I think we might do that from an exhibit here, the seating capacities of the Fox theatres

(Testimony of Edwin F. Zabel.)

that we are talking about, and perhaps you can give them to me approximately, if you want to, and if you know them yourself, fine, in 1949.

Mr. Johnston: Your Honor, if it will save time, we will be perfectly willing to stipulate to those figures in respect [193] to the theatres in the Los Angeles area, if that will serve any purpose.

Mr. Corinblit: All right.

The Court: All right.

Mr. Johnston: I will step up there with the witness, if you wish.

The Court: You can stipulate, then, to the seating capacities of the theatres?

Mr. Johnston: I might say that Mr. Zabel has started to mark off here the Fox theatres in the Los Angeles metropolitan area, and the job has not been completed. Maybe with his help we can complete it right now. We want to check our Fox operations as they were at this time.

Is that correct, Mr. Zabel.

The Witness: Yes.

Q. (By Mr. Corinblit): Let's start with the first run theatres. I think we can start with the Chinese Theatre. It is 2,048 seats. Let me stop for a moment. I am sorry. I don't think I had you point out the Carthay Circle Theatre. That was a first run theatre, too, at that time, wasn't it, 1949?

A. I don't believe it was. The Carthay Circle had been closed a couple of years except for stage shows.

Q. You don't believe it was first run in 1949?

(Testimony of Edwin F. Zabel.)

A. No. [194]

Q. Could we have the Loyola seating capacity?

Mr. Johnston: It is right there.

Mr. Corinblit: 1,234 seats.

The Chinese is 2,048 seats.

The Egyptian Theatre in Los Angeles—that is not on this list. We will have to get that separately.

The Vogue Theatre in Los Angeles, or in Hollywood, 897 seats.

The Iris Theatre, 814 seats.

The Guild Theatre, 965 seats.

The Los Angeles Theatre downtown, 2097 seats.

The Loew's State Theatre downtown is not on this list. We will get that separately.

The Uptown Theatre, 1,715 seats.

The Ritz Theatre, 1,363 seats.

The El Rey Theatre, 860 seats.

The Four Star Theatre is not on this list.

The Wilshire Theatre, 2,296 seats.

The Studio City Theatre, 880 seats.

The Culver Theatre, 1,145 seats.

Q. Have we covered all of them, then, other than the Egyptian and the Loew's State?

A. I believe so.

Mr. Johnston: I will stipulate, your Honor, that those are the seating capacities of the houses and theatres [195] mentioned as of August 1, 1950. I did not know that the El Rey was included among the theatres which Mr. Zabel testified as to being first run theatres, but in any event that is the seating capacity of the El Rey Theatre as read off. [196]

\* \* \* \* \*



(Testimony of Edwin F. Zabel.)

The Court: Let me ask this witness as an expert with 30 years' experience in the industry, what do you mean by "substantial competition" or "reasonable competition"? What is your definition?

The Witness: Any theatre that draws from a like area, they are in competition.

The Court: Would you say the Paramount Theatre in downtown Los Angeles is in competition with a theatre in Watts?

The Witness: Yes, it could be if it is running first run and some people from Watts are downtown they will go to the theatre.

The Court: Would you say there is substantial competition with Inglewood?

The Witness: Yes.

The Court: In other words, substantial competition, as I understand it, is a substantial number of people coming from Inglewood to *go a* downtown theatre, is that right?

The Witness: That is my opinion, yes.

The Court: Well, as far as Inglewood is concerned, what is the area of substantial competition relative to Inglewood? You are acquainted with the geography of that area, are you not? [200]

The Witness: Yes. We have taken tests—in fact, by taking the license numbers of automobiles at the various theatres we were able to tell where the people came from and they come from all directions, all over Los Angeles and to the different places.

The Court: Even Hollywood?

(Testimony of Edwin F. Zabel.)

The Witness: Yes.

The Court: From all over Los Angeles?

The Witness: Yes. They drive from one place to another.

The Court: Why would they drive from Hollywood to Inglewood if they can see the same picture in Hollywood?

The Witness: I don't know, but they do. In checking on the license plates they come from all the metropolitan area. That has been our experience.

The Court: Isn't it true that as far as Fox is concerned in its neighborhood theatres, it depends on the people in that neighborhood for its patronage?

The Witness: I just had an experience last week. We received a letter from a patron in the Inglewood Theatre and he had his address on the envelope from Culver City. The same picture was playing in Culver City that was playing in Inglewood.

The Court: What is the area or realm of competition, substantial competition in the Fox Theatre at Inglewood?

The Witness: I imagine most of the competition is in [201] the Inglewood area—Inglewood and the adjoining area.

The Court: Would you say that they would get any substantial patronage outside of that area?

The Witness: From our experience we have had patronage from outside the area.

(Testimony of Edwin F. Zabel.)

The Court: You have some, but have you had substantial patronage?

The Witness: I don't know how substantial it was because we didn't count them that way, but they do come. I can imagine most of the competition is in the immediate area.

The Court: All right, Mr. Corinblit.

Mr. Corinblit: Just a moment, if your Honor please.

The Court: While you are thinking of a question, I have thought of another one.

Mr. Corinblit: All right.

The Court: When you talk about substantial competition, are you giving any consideration at all to the ease of traffic—that is the ability to get from one place to another?

The Witness: Yes. Some of the boulevards are easier to travel on for longer distances than some of the streets for a shorter distance.

The Court: Isn't it true that this question of substantial competition in the last, say from '51 on, has been controlled a great deal by the ability to park an automobile—that is the parking problem?

The Witness: That is one and the other is accessibility.

A good example is the Hollywood Boulevard theatres. Hollywood Boulevard was in bad condition for a while businesswise, but the freeway came through and business on Hollywood Boulevard picked up, especially the theatres. It is the hottest spot, I would say, in the Los Angeles area—Holly-

(Testimony of Edwin F. Zabel.)

wood Boulevard, and that is because of the free-way, the accessibility of automobiles to Hollywood.

The Court: Now, in this particular area we are talking about there is the Baldwin Hills down there.

The Witness: Yes.

The Court: It is to the north, a little bit to the north and maybe a little west of Inglewood.

Would the Baldwin Hills have any effect upon the question of substantial competition from people north of Baldwin Hills?

The Witness: Toward the city.

The Court: Toward Hollywood, Beverly Hills.

The Witness: Yes. Baldwin Hills would cause—it is very accessible and I believe the proof of the matter is that Baldwin Hills does an excellent business.

The Court: I am not talking about the theatre there at Baldwin Hills. I am talking about the geography and not the theatre.

The Witness: I see.

The Court: Would the Baldwin Hills preclude the people [203] north of the hills from coming down to the Inglewood Theatre?

The Witness: No.

The Court: They could go around them?

The Witness: They could go right through it. Quite a few streets run right through.

The Court: So the hills wouldn't have anything to do with the question of ability to compete?

The Witness: Not today, no.

(Testimony of Edwin F. Zabel.)

The Court: You may proceed.

Q. (By Mr. Corinblit): Mr. Zabel, just to go on with this line of testimony, do you have an opinion—did you have an opinion in 1950 and '51 whether the Paradise Theatre and the Academy Theatre were in substantial competition?

A. Did I have an opinion?

Q. Yes, do you have an opinion?

A. I don't remember whether I had an opinion or not. They are pretty accessible to each other.

Q. Well, my question is, did you in 1950 and 1951 have an opinion one way or the other?

A. Yes, they were in competition.

Q. They were in competition?

A. Yes, I think they are in competition.

Q. Did you have an opinion in 1950 and 1951 that they were?

First, did you have an opinion about that subject in 1950 and 1951?

A. No, I didn't have too much to do with it in 1950 and 1951.

Q. You didn't have any opinion on the subject at that time?

A. Not necessarily, no, sir.

The Court: Will you stipulate the distance between the two theatres? It doesn't mean anything to the jury unless they know how far they are apart.

Mr. Corinblit: Yes, we will get the distance. I think that we will have those.



(Testimony of Edwin F. Zabel.)

Mr. Mitchell: I mentioned yesterday it was 4.4 miles.

Mr. Corinblit: Subject to correction, we will accept that stipulation.

Q. And you didn't have an opinion in 1950 and 1951 whether the Academy and the Paradise were in substantial [205] competition, being 4.4 miles away, did you?

A. I don't know what you mean by an opinion. I think they were in competition.

Q. In 1950 and 1951, my point is, you were the buyer, and my question is, did you have an opinion or not?

A. I don't remember discussing it, but I would say if I had thought of it, I would have the same opinion, they are in competition.

Mr. Corinblit: I move to strike the answer, your Honor, as not responsive.

The Court: It may go out.

Mr. Corinblit: The question is, did you have an opinion in 1950 and 1951?

The Court: You can answer that yes or no.

The Witness: I don't remember whether I had one or not, but if I was thinking of it, I would have had the opinion.

The Court: He says no.

Q. (By Mr. Corinblit): Now, Mr. Zabel, to carry that a step further, was it your opinion that the Chinese Theatre in Hollywood was in substantial competition with the Paradise Theatre in 1950 and 1951?

(Testimony of Edwin F. Zabel.)

A. I would say that it was in competition.

Q. Was that substantial?

A. Substantial competition.

The Court: What is the difference? What is the [206] distance?

Mr. Corinblit: If my recollection is correct, I am sorry I don't have that distance at hand, but——

Mr. Westbrook: What theatres?

Mr. Corinblit: The Chinese and the Paradise.

Mr. Westbrook: Your Honor, we are working up a stipulation on all these distances and we will have it within the next day or so.

The Court: All right: You can bring it in later.

Q. (By Mr. Corinblit): You recall that the Chinese Theatre and the Loyola Theatre in Westchester played simultaneously with each other.

A. Yes.

Q. But it is your testimony that they were in substantial competition?

A. I still think they are in competition.

Q. Of course, it would be your testimony that the Uptown and the downtown theatre of Fox playing first run were in substantial competition?

A. I think so.

Q. And they played simultaneously with each other? A. Yes.

Q. It is your testimony that the Chinese Theatre in Hollywood was in substantial competition with the Loew's State Theatre or the Los Angeles Theatre downtown? [207] A. Yes.

Q. And they played day and date simultaneously

(Testimony of Edwin F. Zabel.)

with each other, is that right? A. Yes.

Q. Now, it is also your testimony that when the Wilshire Theatre played first run, it was in substantial competition with the theatre on Hollywood Boulevard, is that right?

A. The Wilshire Theatre? You mean playing the same picture?

Q. Yes.

A. I don't think they ever played the same picture.

Q. You don't believe they ever played the same picture? A. No.

Q. Therefore, you don't have an opinion one way or the other on that, is that it?

A. If they played the same picture, they would be in substantial competition.

Q. All right. It is true, is it not, that for many years in the city of Los Angeles theatres on first run which were in substantial competition with each other under your definition have played simultaneously with each other, is that right?

The Court: Mr. Corinblit, I think possibly you are [208] misstating the problem. I think he can say the Fox theatres were in substantial competition, but you included all theatres.

Mr. Corinblit: Yes, sir. You are correct.

The Court: Let's eliminate everybody except Fox. This is a Fox witness.

Mr. Corinblit: Thank you for the correction, your Honor.

Q. Referring only to the Fox theatres, it is true

(Testimony of Edwin F. Zabel.)

for many years in this city, theatres, first run theatres in substantial competition with each other played simultaneously with each other.

A. Some played with each other and some played individually.

Q. But in playing with each other, that has gone back for many years in the past, at least since 1934?

A. Well, it varied as to the number of theatres that played together over the period of years.

Q. But at least it began in 1934?

A. I don't remember when it began. It began quite a while ago.

Q. You remember it was in existence in 1934?

A. I don't remember whether it was 1934 when it started but the condition was in existence.

Q. It was also true that, turning for a minute on this matter of substantial competition to theatres in the area of [209] Los Angeles playing on availability of 21 days after first run, they played on that availability although they were in substantial competition with each other?

The Court: That is the Fox theatres?

Mr. Corinblit: The Fox theatres, yes, the Fox theatres.

The Witness: In my opinion, actually the subsequent run theatres are not as much in competition with each other in the various areas as are the first run theatres.

Q. (By Mr. Corinblit): What is the area gen-

(Testimony of Edwin F. Zabel.)

erally as far as the Fox theatres are concerned in which theatres are in substantial competition?

Mr. Johnston: Your Honor, I fail to see what the 21 day theatres in Los Angeles have to do with the issues in this case. I think we are putting things into this case which have no place in it when we start talking about 21 days.

The Court: Are you making an objection?

Mr. Johnston: I do make an objection.

The Court: Overruled.

Q. (By Mr. Corinblit): Will you answer the question, Mr. Zabel?

A. You are referring to our 21 day theatres. I think they are considered more of a neighborhood theatre and they cater more to the neighborhoods in that run than they would be on the first run theatres. [210]

Q. Wasn't the official position of Fox that theatres on 21 days within five miles of each other were in substantial competition?

A. I don't know. I never set any mileage. It depended on the locality.

Q. Do you have an opinion as to the mileage within which Fox theatres on 21 days were in substantial competition with each other?

A. No. I couldn't say. I would say on accessibility.

The Court: May I ask the witness a question?

Mr. Corinblit: Yes.

The Court: You have used another term. You



(Testimony of Edwin F. Zabel.)

say neighborhood theatres. Did you consider the Loyola Theatre a neighborhood theatre?

The Witness: Personally, I did.

The Court: It is a first run theatre, too?

The Witness: Yes.

The Court: So you had first run theatres and neighborhood theatres in this situation.

The Witness: I happened to be against putting first run pictures in there.

The Court: But the fact of the matter is that it is a neighborhood theatre.

The Witness: Yes.

The Court: And a first run theatre. [211]

The Witness: Yes.

Q. (By Mr. Corinblit): To take an example, Mr. Zabel, I don't want to push this too far, but you know the Loma Theatre in Santa Monica, don't you? A. The Loma?

Q. Yes. A. Yes.

Q. That theatre played simultaneously day and date for a period with the Egyptian on Hollywood Boulevard, didn't it? A. I don't believe so.

Mr. Mitchell: When?

Mr. Corinblit: Before 1943, before the Egyptian——

Mr. Mitchell: When did you say?

Mr. Corinblit: Before 1943, when the Egyptian went first run.

Mr. Mitchell: Your Honor, aren't we going a long, long way back to refer to the entire play-off? I object to it as being too remote.

(Testimony of Edwin F. Zabel.)

Mr. Corinblit: I will withdraw the question and ask a question pertaining to a later period on this point.

Q. The Loma Theatre played day and date with a Fox theatre on Hollywood Boulevard in 1950, didn't it, 21 days?

Mr. Johnston: When?

Mr. Corinblit: 1950.

The Witness: I don't recall that. If they did, it [212] would be a matter of record, but I don't recall it.

Q. (By Mr. Corinblit): You don't recall it?

A. No.

Q. Do you recall theatres within this area, however, that I have outlined, which covers from Hollywood Boulevard down to Wilshire Boulevard, down to Vermont, do you recall that there were Fox theatres in that area playing simultaneously with each other?

Mr. Mitchell: Now, when is this?

Mr. Corinblit: In 1950, on the 21 day run.

The Witness: Down Vermont up to Hollywood?

Q. (By Mr. Corinblit): Yes.

A. Yes, there were theatres playing day and date.

Q. Simultaneously with each other?

A. Yes.

Q. Was it your opinion that those day and date theatres were in substantial competition with each other?

Mr. Johnston: On the 21 day run?

(Testimony of Edwin F. Zabel.)

Mr. Corinblit: Yes.

The Witness: No.

Q. (By Mr. Corinblit): Have you ever discussed this matter——

The Court: Just a minute. Do I understand you are making a difference in your definition of substantial competition according to runs? [213]

The Witness: Yes, I am making a difference between substantial competition, between the runs of theatres.

The Court: In other words, you would say that it would be in substantial competition on first run, but not in substantial competition on third run, or 21 day run?

The Witness: That is correct.

Q. (By Mr. Corinblit): Now, Mr. Zabel, could you give the jury your definition of the word substantial as part of that definition of substantial competition as you have stated the term?

A. Well, I would say that if one area draws quite a number of people from the other area, it is in substantial competition.

Q. What do you mean by quite a number?

A. I don't know. I haven't any idea.

Q. I beg your pardon?

A. I said that——

The Court: Let me ask the witness a question.

The Witness: Yes.

The Court: Suppose you have a theatre with 1,000 capacity. You fill that theatre, have a thou-

(Testimony of Edwin F. Zabel.)

sand people in it. How much of that thousand would you consider substantial? 100? 50?

What is substantial?

The Witness: I don't know whether I could peg it. [214] I would say if quite a lot of people come there, that would be substantial competition.

The Court: You know, quite a number doesn't mean anything to this jury. I might consider three quite a number.

The Witness: It would be pretty hard to make a guess at what you would call it. I would say if it has 15 or 20 per cent, it would be substantial competition.

The Court: 15 or 20 per cent?

The Witness: Yes.

Q. (By Mr. Corinblit): Now, then, applying that as between two theatres, taking the court's question, a theatre of 1,000 people, 15 or 20 per cent being substantial competition, is it your testimony that the Chinese Theatre drew 15 or 20 per cent in 1949, 1950 and 1951 from the Westchester district?

A. I have never checked it, but I do know if the Chinese Theatre runs King and I, the only theatre in town, it does a lot of business and runs a long time, where a picture that is run in four or five theatres does not run as long and does not do the business.

Q. My question to you, Mr. Zabel, is in 1949, 1950 or 1951, was it your opinion or is it your opinion now as to those periods, that the Chinese on

(Testimony of Edwin F. Zabel.)

Hollywood drew 15 or 20 per cent of its business from the Westchester district?

A. I don't know.

Q. You don't know? [215] A. No.

Q. Do you have an opinion whether they drew 5 per cent from the Westchester district?

A. I don't know. They played to quite a few people. They come from all over the metropolitan area.

Q. Do you have an opinion whether they drew 5 per cent? A. No, not any percentage.

Q. Any percentage, not even one per cent?

A. No.

Q. Was it your opinion that a theatre playing downtown would draw 15 or 20 per cent on first run from the Westchester district?

A. I don't know. All I know is that the theatre will—one theatre runs in the metropolitan area, and it does a great deal more business and runs a longer time than if four or five theatres would run the picture at the same time. Whether they drew from the Inglewood district, Westchester, or the Valley, I don't know. They draw from all areas. What the percentage is, I don't know. That was just a guess.

Q. Just a guess?

A. What I would say substantial competition is.

Q. Earlier, a few minutes ago, I think, if I understood you correctly, you testified that it was your opinion that substantial competition, that there was substantial competition between the Chinese



(Testimony of Edwin F. Zabel.)

Theatre on Hollywood Boulevard and [216] the Paradise Theatre in Westchester.

The Court: That is on first run.

Q. (By Mr. Corinblit): On first run.

A. On first run.

Q. And then in answer to the court's question, I believe you stated that your definition of substantial competition would be 15 or 20 per cent.

A. Not on first run. I believe the court asked me if there are two areas together what I considered substantial competition.

Q. Now, on first run, what do you mean by substantial competition, what percentage?

A. I don't know what the percentage would be, but I do know a first run theatre, the Chinese Theatre, for example, advertising The King and I, it advertises all over the metropolitan area, and they do do a lot of business that way. I do know when they play in four or five theatres, none of the theatres do as much business. It is split between them.

The Court: You mean all the four or five theatres don't do as much business as the one theatre?

The Witness: That has been proven. That is right.

The Court: That is the testimony?

The Witness: Yes.

The Court: You don't get as much business out of [217] five theatres as you do out of one?

The Witness: That is true.

Q. (By Mr. Corinblit): And that would be true by the week, is that right?

(Testimony of Edwin F. Zabel.)

A. I didn't say by the week. By the run.

Q. In other words, you are comparing a run of perhaps 10 or 12 weeks in the Chinese, one theatre, with a run of one week in five theatres?

A. If the theatre does business, it runs longer than one week in five theatres.

Q. Comparing them by the week, is it your testimony that the theatre grosses more?

A. No, that is not my testimony.

Q. In other words, that would not be true at all?

A. No.

Q. The five theatres would gross a lot more than the one theatre for one week.

A. Not necessarily.

Q. What would be your general opinion on that?

A. Generally, for one week I would say it would gross more.

Q. In the five theatres than in the one.

A. For one week.

Q. For one week.                      A. Yes. [218]

Q. I don't want to labor on this question any more, but I just want to get clear, you have no idea in terms of percentage as to the percentage of people from Westchester that went to the Chinese Theatre on first run in 1950 and 1951.

A. I have never checked the figures. I don't know the percentage figure from each individual area.

Q. Do you have any idea in terms of number of people?                      A. No. [219]

Q. You didn't have in 1950 and 1951?

(Testimony of Edwin F. Zabel.)

A. No.

Q. You never discussed that with any distributor, did you, the number of people? A. No.

Q. Or the percentage of people?

A. Not that I know of.

Q. That never came up in your negotiations with the film company—that is, the numbers of people or percentage of people?

A. I don't know. I never had any reason for discussing that.

Q. Now, Mr. Zabel, with respect to Fox first-run theatres, do you remember in 1949 Fox was playing Fox theatres—Fox theatres were playing Los Angeles first run on Loew's pictures, is that right?

A. Fox theatres were playing Loew's pictures?

Q. Yes, in 1949?

A. I don't know whether it was in 1949 or not.

Q. You don't recall that? A. No.

Q. Do you recall whether they played them in 1950? A. No, I don't.

Q. In 1949?

A. What theatres are you talking about now?

Q. Well, any Fox theatres. I will be glad to—do you want to know what theatres I think they were playing in, Fox theatres?

A. You are talking about Fox Los Angeles and first run.

Q. Loew's product in Fox theatres on first run. Do you remember that they were playing regularly on first run in Fox houses? A. (No answer.)

(Testimony of Edwin F. Zabel.)

Q. Do you remember that?

A. They were at some time but I don't remember whether they played in 1949 or '50.

Mr. Mitchell: Can't we simplify the matter by agreeing when the United Artists Theatre Circuits were taken away from Fox and started operating by themselves, that being February 1950.

Mr. Corinblit: I think with Loew's State you will find it was an earlier date.

Mr. Mitchell: My understanding is it was February 1950, but what earlier date do you want to talk about so we can get an approximation?

Mr. Corinblit: We can get it from Mr. Bertero.

Mr. Johnston: November 1949 in regard to Loew's State.

Mr. Corinblit: And with regard to the Egyptian.

Mr. Johnston: If you put Mr. Bertero on the stand he can [221] answer all of those questions. Same date.

Mr. Mitchell: And other United Artists theatres apparently separated from Fox West Coast in February 1950—January 1, 1950.

Mr. Corinblit: Is that a stipulation?

Mr. Mitchell: I will agree to that.

Mr. Johnston: My understanding is the United Artists Theatre in Inglewood started operations as the United Artists Theatre Circuit in February 1950. I don't know the precise date. I will say early in 1950 with respect to that one theatre.

Q. (By Mr. Corinblit): Now, with that stipulation in mind, that it was November of 1949 that

(Testimony of Edwin F. Zabel.)

the Loew's State Theatre went back to United Artists Theatre Circuit, do you remember that in 1949, prior to that time, Loew's product was playing first run regularly in Fox Theatres?

A. It seems to me that Loew's State went back to Loew's some time—I don't remember when it was.

Q. Prior to that time?

A. We didn't have anything—we weren't operating Loew's State at that time.

I may be confused, but I believe that Loew's were operating and then United Artists, weren't they?

Mr. Johnston: That is correct. I will stipulate to that.

Mr. Corinblit: What is that? [222]

Mr. Johnston: Loew's operated Loew's State for a period of time and United Artists Theatre Circuit operated them thereafter.

Mr. Corinblit: We will have testimony on that. I don't know about that.

Q. Mr. Zabel, so we can get this clarified,—

I would like, your Honor, at this time, to offer into evidence the play-off of Loew's pictures in first-run theatres in the City of Los Angeles.

The Court: For what period of time?

Mr. Corinblit: I think I would like first to offer that play-off for the period beginning January 1, 1949, through September 1951.

We have a stipulation with counsel with respect to the authenticity and accuracy of the document



(Testimony of Edwin F. Zabel.)

subject, of course, to any corrections, and I would like to make that offer at this time.

Mr. Mitchell: Your Honor, no request was made by the Paradise Theatre for product until February 1950. It didn't open until August 1950.

How pictures played in 1949—pictures played in 1949 could not have effected Mr. Schreiber and his theatre at all and therefore—

The Court: That is true, but he wants to show what the general condition was in Los Angeles in 1949 just before the [223] Paradise Theatre opened.

Mr. Mitchell: I understand what they want to show. They want to inject 1949 and show the operation by different parties at a different time. If you take the date 1950 on you will have the operation and you won't confuse the jury as to who was operating the theatre.

You will find the theatres were operated during the year 1950 and during the year 1951 by the very same persons.

You don't have to confuse the jury by going back to 1949 which injects confusion which would have no effect on Mr. Schreiber because Mr. Schreiber wasn't even on the scene until 1950.

The Court: Mr. Corinblit, wouldn't it be satisfactory to start with January 1, 1950?

Mr. Corinblit: No, your Honor, and there is a reason for that.

The conditions under which the change was made from what happened in 1949 to what happened in 1950, which continued up through our period, is

(Testimony of Edwin F. Zabel.)

very important—that is, there will be testimony with respect to conversations and understandings that were entered into with Fox during the time that they had the first run that moved—that effected the switch in 1950, moving up into our period. Those conversations are very important and this is the background for those conversations. [224]

The Court: The objection is overruled.

Mr. Corinblit: These are now attached, and I will ask——

The Court: They will be received in evidence.

Mr. Corinblit: I will ask if you can do so, to number them 46A-1-A.

Mr. Westbrook: You included others in that list. If you are going to——

Mr. Corinblit: That is right.

Mr. Westbrook: Let us detach that now.

The Court: Now, the words “play-off” have been used here. What does it mean? I know what it means but the jury doesn’t.

The Witness: Play-off? What company’s product each theatre played during the period of time—the play-off of the picture. In other words they booked Metro pictures, Fox pictures—that is the play-off.

Juror: We can’t hear you.

The Witness: I am sorry. The play-off is the number—the company’s pictures—the number of pictures that were played in a certain theatre during a certain period of time.

(Testimony of Edwin F. Zabel.)

The Court: It is a record kept, is it not? It is a written record kept of the pictures played.

The Witness: Yes. Maybe you play one picture each week. We may play one picture two weeks during the period [225] of a year or you may play all the way from 30 to 50 pictures in that particular theatre from different companies or maybe the same company, but that is the number—that is the list of the play-off of the pictures—the performances of the picture in that particular theatre. That is what they call “play-off.”

The Court: Now, while we are defining terms, there is another term that has been used here. What do you mean by “top half” of the bill?

The Witness: Top half of the bill is a theatre where you play two pictures. Generally the top picture, the top half is the good picture, the better picture—box office picture. The lower half is what we call a second picture.

The Court: The lower half is the lower half.

The Witness: That is the second picture, generally the picture that you don't like.

The Clerk: Is this exhibit received in evidence?

The Court: Yes.

The Clerk: 46-A-4.

(Whereupon the exhibit referred to was marked Plaintiff's Exhibit 46-A-4, and received in evidence.)

Mr. Corinblit: The date of Exhibit 46-A-4 is the period from January 1, 1949, through September 25, 1951.

(Testimony of Edwin F. Zabel.)

Q. Mr. Zabel, I want to show you the play-off list, which has been admitted in evidence, of Loew's pictures on [226] first run in the year 1949.

You note that on the first page all of the pictures, with one exception at the Four Star, played at Los Angeles, Wilshire and Egyptian Theatres in that year 1949 up through—first let us go up through October, up through October, all of those three theatres belonged to Fox, is that correct? That is our stipulation, I believe, isn't that right, counsel—Los Angeles, Egyptian and Wilshire belonged to Fox through October 1949?

Mr. Johnston: Yes.

Mr. Mitchell: Fox operated them.

The Witness: Fox operated them.

Mr. Johnston: Fox operated them.

Q. (By Mr. Corinblit): Now, turning to 1950, substantially all of the pictures on the first sheet running from January '50 to June of '50 were played in the Loew's State and Egyptian Theatre, is that correct? A. Yes.

Mr. Mitchell: Can we have a stipulation that they were operated then by United Artists Theatre Circuit?

Mr. Corinblit: We will so stipulate.

Mr. Johnston: Subject to the qualification that Loew's operated, as I understand it, Loew's State Theatre some time after 1949 for a period of time.

Mr. Corinblit: I don't know the facts on that, counsel. [227] I would like to know in the interim. What happened and how long it lasted, but subject



(Testimony of Edwin F. Zabel.)

to that, yes, we can stipulate, but I will be glad to enter into that stipulation if I can see the facts on them. [228]

\* \* \* \* \*

Mr. Corinblit: Mr. Zabel, first examining the period from January of 1950 to approximately June of 1950, it is true, is it not, that during that six months' period all of [229] Loew's pictures played in the Loew's State and Egyptian Theatres or in the Egyptian Theatre alone. Isn't that correct? Is that true from your examination—through June of 1950?

The Witness: I don't think we operated these theatres at that time.

Mr. Mitchell: I can't hear you.

The Witness: I don't think we operated Loew's State at that time.

The Court: You don't think it is a correct play-off?

The Witness: I don't know. That is what it says right here. Do you want me to answer what that says on here?

The Court: You stipulate this is a correct play-off, don't you?

Mr. Mitchell: That is right.

Mr. Johnston: To ask this witness what was played in the theatres after Fox West Coast ceased to operate them may be outside of his knowledge. The witness doesn't need any help in reading off the play-off record. We stipulated to its accuracy.

The Court: I might say to the witness if you



(Testimony of Edwin F. Zabel.)

don't know, just say so. If you don't know, say so. There is no disgrace by admitting you don't know. It will be a lot easier to say you don't know if you don't know.

The Witness: I don't know because we weren't operating the theatre as of this period of time, I don't believe. [230]

Mr. Corinblit: Mr. Zabel, is it correct—you are correct. He is referring to 1950. That is, Fox was not operating the Loew's State and Egyptian in 1950.

The Witness: That is right.

Q. (By Mr. Corinblit): But it did operate them for most of 1949? A. Yes, sir.

Q. Right? A. Yes, not Los Angeles.

Mr. Mitchell: We can't hear you, Mr. Zabel.

The Witness: Los Angeles—I don't think we operated the Loew's State in 1949 at all. I don't know. I imagine, subject to verification, but I don't believe we did.

Mr. Corinblit: We had a stipulation that Fox was operating the Loew's State until October or November of 1949, is that correct?

Mr. Johnston: That is the stipulation.

The Witness: I am sorry.

Q. (By Mr. Corinblit): All right. Mr. Zabel, were you present at any of the negotiations which led to the switch of Loew's product from the three Fox theatres that played them in 1949, to the Loew's State and Egyptian in 1950?

A. No. I may have been present, but I didn't

(Testimony of Edwin F. Zabel.)

handle the situation because I was in charge of the department and they were handled mostly by other people in my department. [231]

Q. You remember, do you not, Mr. Zabel, that in 1950 Fox did not, after the pictures had gone to the Loew's State and to the Egyptian Theatre during the first part of 1950, that Fox did not thereafter negotiate with Loew's for their pictures during that period? Do you remember that?

A. No.

Q. You don't remember that one way or the other?     A. No.

Q. Do you remember—you certainly didn't bid for their pictures, did you?

A. No, we didn't.

Q. Now, isn't it a fact, Mr. Zabel, that just prior to 1950 Fox and Loew's and United Artist entered into an agreement whereby Loew's pictures would be moved from the three Fox theatres to the Egyptian and Loew's State and whereby Fox would not thereafter attempt to compete for Loew's pictures?     A. No.

Mr. Mitchell: Wait a minute, your Honor. I object to the question on the ground it calls for a conclusion.

If they are going to prove such an agreement, and they won't be able to prove there was such an agreement, but if they are going to prove one, they have got to prove it either by a piece of paper or by what somebody said.

(Testimony of Edwin F. Zabel.)

To ask this man to speculate on or give his conclusion [232] is not a proper question.

The Court: This is cross examination.

Mr. Mitchell: I understand this is cross examination.

The Court: All he has to do is say no, if he doesn't know.

Mr. Mitchell: But he calls for a conclusion, your Honor, and I object to the form of the question.

He should be able to say what people said if he was there, and he couldn't have been, or he ought to be able to say what people wrote, but to ask him to conclude on the basis of some rumor or perhaps on the basis of nothing as to whether there was an agreement is an improper question.

The Court: Read the question.

(Question read by the reporter as follows:

"Q. Now, isn't it a fact, Mr. Zabel, that just prior to 1950 Fox and Loew's and United Artist entered into an agreement whereby Loew's pictures would be moved from the three Fox theatres to the Egyptian and Loew's State and whereby Fox would not thereafter attempt to compete for Loew's pictures?")

The Court: The objection is overruled. You can answer that question yes or no.

The Witness: I know of no such agreement.

Mr. Corinblit: How is that?

The Witness: I didn't participate in anything like that [233] and I don't know about it.

(Testimony of Edwin F. Zabel.)

Q. (By Mr. Corinblit): Mr. Zabel, do you know Mr. Pirosh? A. Yes.

Q. Who was Mr. Burt Pirosh? In what work was he engaged? What work did he do as far as you know, in 1949, in the latter part of 1949?

A. Burt Pirosh was a film buyer.

The Court: For whom?

The Witness: For Fox.

Q. (By Mr. Corinblit): And did Mr. Pirosh work under your supervision and direction?

A. Yes, sir.

Q. Isn't it a fact, Mr. Zabel, that Mr. Pirosh told you that he and the operators—that he and Mr. Pat DeCicco—let me stop there. You know Mr. Pat DeCicco? A. Yes, I know Mr. DeCicco.

Q. In 1949 who was Mr. Pat DeCicco?

A. Mr. Pat DeCicco was with the United Artist Theatre.

Q. And that was the company that took over the Loew's State and the Egyptian, is that right?

A. Yes.

Q. Now, isn't it a fact that Mr. Pirosh told you that he and Mr. DeCicco had had a meeting in the latter part of 1949, in which they had—in which Mr. DeCicco had stated [234] that he wanted to play Loew's product in all of the United Artist Theatres and that Mr. Pirosh had said he, on behalf of Fox, would agree and that thereafter Mr. Pirosh told you that both he and Mr. DeCicco discussed the matter with the representatives of Loew's

(Testimony of Edwin F. Zabel.)

Incorporated and Loew's Incorporated said they would agree to that arrangement?

A. No, he never told me that.

Q. Now, have you learned without regard to him telling you that, of that fact since that date?

A. No.

Q. Have you read the deposition of Mr. Pirosh in this case?

A. No. [235]

\* \* \* \* \*

Q. (By Mr. Corinblit): Now, Mr. Zabel, let me call your attention to the period in 1949 when Loew's pictures were playing regularly in the Fox Theatres. Now, it is true, is it not, Mr. Zabel, that in 1949 when Fox played Loew's pictures in the Los Angeles Theatre, no other theatre other than a Fox house played simultaneously on Loew's product with that Fox Theatre, is that correct?

A. I didn't get that question. [236]

Q. If a picture played first run in the Los Angeles Theatre downtown, no other theatre played simultaneously with the Los Angeles Theatre on that picture other than the Fox theatres?

A. This is what is true here. They are all Fox theatres, aren't they?

Q. That's right. That was true in 1949, was it not?

A. Yes. [237]

\* \* \* \* \*

Q. The question now, Mr. Zabel, is this: Isn't it true that as long as you remember in the city of Los Angeles, if a Fox theatre downtown played a picture on a first run, no other theatre in the city



(Testimony of Edwin F. Zabel.)

of Los Angeles played that picture simultaneously first run except a Fox theatre?

Mr. Mitchell: Now, wait a minute, your Honor. I object to the question on the ground it is too long in scope. We can't just try this case on the basis of as long as you remember and come in and try to refute things as long as Mr. Zabel may remember in his long experience. It is immaterial.

The Court: There is another question comes up in [238] my mind. Are you speaking of all first run pictures by all companies, or just Fox first run?

Mr. Corinblit: All first run pictures, your Honor.

The Court: All first run pictures?

Mr. Corinblit: Yes.

The Court: Metro, Paramount, Warner Bros.?

Mr. Corinblit: Yes, sir. If they played first run in a Fox theatre downtown, whenever this may have occurred, did it ever happen that any other theatre of any other ownership played simultaneously with them. That is the question.

The Court: I will restrict the question to 1949, 1950 and 1951.

The Witness: It is a pretty hard question to remember. I don't remember the play-off of all the pictures for those years. All I do know is right here. These Metro pictures played in the downtown, Wilshire and Hollywood areas only, according to this statement.

Q. (By Mr. Corinblit): Mr. Zabel, you remember, though, that Fox never, if it played a picture

(Testimony of Edwin F. Zabel.)

first run downtown, didn't play day and date with any theatre that belonged to anyone else in 1949? Don't you remember that?

A. No, I don't remember.

Q. You don't remember? A. No. [239]

\* \* \* \* \*

Mr. Corinblit: I would like to offer at this time in evidence, your Honor, the Universal play-off from January 1, 1949, to September 18, 1951.

The Court: What is the number?

Mr. Corinblit: Exhibit 46-A-5. [241]

The Court: It may be admitted in evidence.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 46-A-5.)

The Court: That is January 1, 1949, to what in 1951?

Mr. Corinblit: September 18, 1951.

The Clerk: It says September 20.

Mr. Corinblit: All right, September 20.

The Court: September 20.

Q. (By Mr. Corinblit): Mr. Zabel, I will show you what has been admitted as Plaintiff's Exhibit 46-A-5, the play-off of Universal Pictures on first run in Los Angeles from January 1, 1949, to the end of September 1951. I ask you to examine that.

It is a fact, is it not, that Universal Pictures during this period played regularly in a group of four theatres which at this time were Fox theatres, and one theatre downtown, the United Artists Theatre, which was not a Fox theatre?

(Testimony of Edwin F. Zabel.)

A. It played the United Artists, the Ritz, the Guild, the Iris, and Studio, five theatres.

Q. Will you call those off again and I will point them out to the jury so they can see what we are talking about. They played the United Artists Theatre downtown, which is [242] here (indicating). What else? A. The Ritz.

Q. The Ritz, which is here (indicating).

A. The Guild.

Q. The Guild, here (indicating).

A. The Iris.

Q. The Iris, which is here (indicating).

A. And the Studio.

Q. And the Studio, here (indicating). Any other theatre?

A. That's all at that point, until later on some more played.

Q. What other theatres played later?

A. Culver.

Q. Right here (indicating). Any other theatres?

A. The El Rey is in here.

Q. And the El Rey, right here (indicating).

Mr. Zabel, the exhibit to which I have referred shows that this was true for 1949, 1950 and 1951.

Mr. Mitchell: Rather than have his recollection, won't you find that in 1950 and 1951 the Guild and the Iris no longer played first run, and instead the Vogue played first run Hollywood alone?

Mr. Corinblit: Yes.

Mr. Mitchell: Alone on Hollywood Boulevard, I mean. [243]

(Testimony of Edwin F. Zabel.)

Mr. Corinblit: Yes.

Mr. Mitchell: And the El Rey didn't play first run at all except one or two occasions.

Mr. Corinblit: I think that is correct, yes.

Q. Now, Mr. Zabel, when was the arrangement whereby Universal Pictures went into this group of theatres arrived at, to your knowledge?

A. Arrived at between William Scully and myself.

Q. And when?

A. I imagine a short time prior to January 1949.

Q. You say a short time prior?

A. I imagine it had to be prior or they couldn't play there.

Q. How long prior to January 1949?

A. I don't know. I imagine it was shortly prior.

Q. Within three months?

A. I don't know. I should think so.

Q. Do you know?

The Court: Will you keep your voice up, please?

The Witness: I have an idea. We made the agreement that it would go into effect as soon as possible.

Mr. Mitchell: I will stipulate it was 1946, which is the time we all knew it occurred.

Mr. Corinblit: Counsel, will Mr. Johnston on behalf of Fox stipulate to the same fact? [244]

Mr. Johnston: Yes.

Q. (By Mr. Corinblit): Mr. Zabel, your counsel here states that this agreement took place three years before 1949.

(Testimony of Edwin F. Zabel.)

A. It might be. You showed me the statement here and it said 1949. It perhaps did. I don't know. I remember when I made it. I know what deal I made, but I don't remember the date.

Q. In 1946, you say you had a conversation with Mr. Scully? A. Yes, if that is the date, yes.

Q. And Mr. Scully, who was he?

A. Mr. Scully at that time was in charge of distribution for Universal.

Q. And your position at that time was what?

A. Head of film buying department in Los Angeles.

Q. And you discussed with him this matter of getting first run pictures into this group of Fox houses, is that right?

A. No. Mr. Scully came to me and asked if he could have a number of houses to run his pictures in. His claim was that he didn't have proper representation for his pictures, and that the stars and the producers and everybody complained that they played in a few theatres where all the other distributors had more seating capacity, and he said he wanted [245] enough theatres to at least make up 6500 seats, as he felt that was a proper representation for their pictures and the producers and stars and directors would be satisfied with that number of seats, that they were getting proper release in Hollywood. By Hollywood, I mean the Los Angeles area.

Q. What did you say?



(Testimony of Edwin F. Zabel.)

A. We would try to satisfy him, and he picked the locations himself.

Q. You provided him with the theatres?

A. Yes.

Q. And he said, "I will put Universal Pictures in them"? A. Yes.

The Court: Mr. Corinblit, I don't know whether the jury can hear you or not. You are talking this way.

Mr. Corinblit: I better get back here.

The Court: It may be important testimony. If it is, the jury ought to hear it.

Mr. Corinblit: Did the jurors hear the answers the witness gave?

Q. From that time on, in 1946 through 1951, Universal pictures, Universal delivered their first run pictures to that group of theatres with some modification for five years, isn't that right?

A. Apparently. According to these dates, yes.

Q. That is correct, is it not? A. Yes.

The Court: Do I understand you got all the Universal pictures?

The Witness: I don't know. I would say substantially all. I am not sure that it is.

The Court: Substantially all?

The Witness: Yes.

Q. (By Mr. Corinblit): Mr. Zabel, when Mr. Scully told you at the end of this discussion that he would deliver Universal pictures to this unit of Fox theatres in 1946, did he tell you that before his discussion with you the president of his com-

(Testimony of Edwin F. Zabel.)

pany and the president of your company had already made such arrangements with an officer of RKO? Did he tell you that?     A. No.

Q. Did he tell you that he had discussed with the persons having control of the RKO theatres the matter of transferring Universal from RKO to Fox, and that the person in control of RKO theatres had agreed Universal pictures should be moved out of the RKO theatres into the group of Fox theatres?     A. No.

Q. Have you learned that fact since that time?

A. No. I don't know it is a fact.

Q. Have you discussed that matter with Mr. Bertero at [247] all?     A. No.

Q. Who was Mr. Bertero in 1946?

A. Mr. Bertero was in charge of our legal department.

The Court: You say "our." You mean Fox?

The Witness: Fox legal department. Excuse me.

The Court: Is that Fox West Coast?

The Witness: Fox West Coast legal department.

Q. (By Mr. Corinblit): For each year thereafter to your knowledge Universal delivered their pictures to you without ever requesting any other theatre to compete for those pictures, isn't that correct?

A. I don't know whether they requested or not. They put the pictures in these particular theatres.

Q. And you never had to compete for them?

A. Not that I know of.

The Court: May I inquire, when you made this

(Testimony of Edwin F. Zabel.)

agreement, or when the agreement was made, what kind of financial arrangements were made? Were you to pay so much for the pictures? Were you to pay so much revenue according to the admissions?

The Witness: Yes. Most of the film deals or licensing was based upon percentage, and if it was a second picture, it was perhaps flat rental.

The Court: So these pictures were delivered upon a [248] percentage basis?

The Witness: Oh, yes.

The Court: Now, may I ask another question here to clarify something I think the jury ought to know.

You have been talking about bids, making a bid. When you make a bid, is the bid made usually upon a percentage or upon a flat basis?

The Witness: Well, when you are bidding for a picture, the distributor puts up a picture for bid for anybody that wants to buy it. Sometimes they stipulate terms on the picture, and again they just leave it open and the exhibitor, some of them bid flat, some of them bid percentage, and some of them bid a guaranteed flat against a percentage.

They generally stipulate in there how many days they are going to run or weeks, whatever it is.

The Court: Will you explain to the jury what you mean by a percentage of the picture?

The Witness: Percentage of the picture is a percentage of the gross of the theatre. Generally it varies from, oh, I would say from a minimum al-

(Testimony of Edwin F. Zabel.)

most of 15 per cent up to 70 per cent, and sometimes higher than that.

The Court: That is not gross.

The Witness: The gross of the theatre, gross income.

The Court: That is the admissions, gross admissions. [249]

The Witness: That's right, gross admissions at the box office.

The Court: It has nothing to do with popcorn or candy?

The Witness: No.

The Court: What do you mean by flat?

The Witness: Flat, they work out a deal where they pay a fixed amount of money for that picture for that week in a theatre, or a longer time, but they generally buy it for a one-week run, and if you run more than one week, it is so much more, generally at a pro rata basis. The percentage will take care of itself, because the box office gross each week determines what you pay. [250]

The Court: The Universal pictures you are now talking about over this five-year period——

The Witness: Yes, sir.

The Court: Came to you on a percentage basis.

The Witness: If they were top pictures, yes, but a second picture generally a flat deal was worked out.

The Court: Was a deal worked out for each individual picture?

The Witness: Yes, sir.

(Testimony of Edwin F. Zabel.)

The Court: That became available?

The Witness: Yes, sir.

The Court: Although you had the right to the picture nevertheless you had to negotiate to determine what you were going to pay for it?

The Witness: Yes, sir; you have to negotiate for every one of them.

The Court: Speak up.

The Witness: I don't want to confuse this. Some of these pictures at one time you negotiated for more than one picture at a time. You may have a set of terms on five pictures and then again maybe you set it for just one picture.

As I say you book it in to the theatre when you get the date in the theatre and just prior to that you negotiate the deal. [251]

The Court: Then as I understand during these five years, although you had all the the Universal pictures or practically all of them——

The Witness: Yes, sir.

The Court: —— nevertheless as these pictures became available you had to negotiate the terms for them?

The Witness: Yes, that is correct.

Q. (By Mr. Corinblit): There came a time, did there not, Mr. Zabel, when Fox no longer owned United Artists Theatre downtown, isn't that right?

A. That is true.

Q. And that went back to United Artists Theatre Circuit, Inc., isn't that right? A. Yes, sir.

Q. Despite that fact, during this five-year pe-



(Testimony of Edwin F. Zabel.)

riod all United Artists—Universal pictures continued to play downtown in the United Artists Theatre downtown?    A. Yes, sir.

Q. Now, were you present at a meeting where that arrangement was made?

A. No, I don't believe I was. I don't recall that arrangement, but it was requested by Universal and it would be almost automatic if they could get together on terms.

Q. Were you present at a meeting between Mr. Skouras and the president of Universal and the representative of [252] United Artists Theatre in which it was agreed that United Artists products—that Universal products would continue to go to the United Artists Theatre with the four Fox theatres day and date?    A. No.

Q. Did you ever learn of that agreement since that time?    A. No, sir.

Q. Did you ever discuss that agreement with anyone at Fox?    A. No.

Q. You know that there was an arrangement whereby that was true?

A. No, but I know they played in the theatre because Universal asked for it.

Q. Automatically every picture that came off played simultaneously with the United Artists Theatre downtown and the four Fox houses?

A. That was Universal's request.

Q. And that is what happened?

A. That is what happened.

Q. Now, did the theatres that we are referring

(Testimony of Edwin F. Zabel.)

to that Mr.—that were discussed, you say, between you and Mr. Scully in 1946, it at least included the Culver Theatre in Culver City, is that right?

A. Yes, that is for a time.

Q. Yes. Did Mr. Scully, the vice president in charge of Universal, say anything to you about the area of Culver City? Did he think that was a perfectly good area for first-run pictures? Did he say that?

A. Well, he just wanted more seats.

Q. Just wanted more seats?

A. Asked to play in the Culver Theatre.

Q. And he said the seats in that area were perfectly agreeable to him?

A. He wanted them spread all over at that time.

Q. Now, what is that time you are referring to?

A. Well, the theatres, for all of these theatres.

Q. 1946, isn't that right? A. Yes.

Q. And that continued through 1951?

A. Yes.

Q. The time you are referring to was from 1946 to 1951, a five-year period?

A. That is correct. I think I am getting confused now because there are some different theatres here at the time but most of the time they were these five theatres.

Q. Now, did you say to him that the Culver area was an improper area for first-run pictures?

A. I don't remember whether I did or not. As far as I [254] am concerned, it was.

Q. It was? A. Yes, an improper area.

(Testimony of Edwin F. Zabel.)

Q. An improper area for first run?

A. Yes, sir.

Q. So Mr. Blumberg—so Mr. Scully that is, the sales manager for Universal, said to you he is willing to put a Universal picture first run in an improper area, is that it?

A. Maybe he thought it wasn't an improper area. I always disagreed with him on that. I also disagreed with him on two theatres on Hollywood Boulevard but he said he wanted seats to compete with the big theatres on Hollywood Boulevard. He wanted two theatres.

Q. During that period—as a matter of fact, there were two theatres within several blocks of each other and playing simultaneously?

A. That is correct.

Q. There is no question about those two theatres being in substantial competition with each other?

A. In my opinion they shouldn't have played together at all.

The Court: That isn't the question.

The Witness: Yes, they were in substantial competition.

Q. (By Mr. Corinblit): There was no question but what the Culver Theatre was in substantial competition with the [255] Ritz Theatre?

A. Yes, they are quite close.

Q. They were in substantial competition?

A. Yes.

Q. Did Mr. Scully say that he objected to two

(Testimony of Edwin F. Zabel.)

theatres in substantial competition with each other playing simultaneously day and date?

A. No. He wanted two theatres because he wanted the seating capacity on Hollywood Boulevard comparable to the Pantages or the Chinese or the Egyptian or Warners.

Q. How many seats did the Culver Theatre have? A. I think around 1200.

Q. 1145 seats, isn't that right?

A. (No answer.)

Q. And the Vogue Theatre, when that played first run alone, had about 900 seats? A. 900.

Q. All right. Now, during this same time, at least part of this period—take it up to 1950 and looking at Loew's product and looking at Universal's product, they were playing day and date—they were playing first run in Fox houses, Loew's and one group of Fox houses for Loew's and one group of Fox houses for Universal with slight exception, isn't that right?

A. Loew's pictures were playing in Los Angeles, Wilshire [256] and Egyptian, and the Universal pictures were playing in the United Artists, the Ritz—well, the Vogue at that time you are talking about—Studio. [257]

Q. Now, it was also true, was it not, that at that time the Fox pictures, Twentieth Century-Fox pictures were playing in a unit of Fox houses, isn't that correct?

Mr. Johnston: At what time?

Mr. Corinblit: First beginning in 1949.

(Testimony of Edwin F. Zabel.)

The Witness: (No answer.)

Q. (By Mr. Corinblit): You remember that, Mr. Zabel?

A. Yes, '49. I don't remember just what theatres were in it.

Q. All right.

Mr. Corinblit: Your Honor, we will offer in evidence as Plaintiff's Exhibit next in order Twentieth Century-Fox play-off January 1, 1949 until September 1951.

The Court: It may be admitted.

The Clerk: Exhibit 46-A-6 in evidence.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 46-A-6.)

Q. (By Mr. Corinblit): Now, I will show you Plaintiff's Exhibit 46-A-6, Mr. Zabel, and ask you if it is not correct that on the first page, which covers firstly the first four months, regularly the Twentieth Century-Fox pictures played in a group of five—well, sometimes in five and sometimes four and sometimes three theatres, is that right?

A. They played one picture—one picture played in Loew's State, Chinese, Uptown and Loyola and played Loew's [258] State, Chinese, Uptown, Loyola and Carhay Circle.

Q. Carhay Circle. And would you read off the list that played in February 1949?

A. Played in the Vogue, Orpheum, Belmont, Culver and El Rey.

Q. Let us stop for a minute now and we will point out some of the other theatres.



(Testimony of Edwin F. Zabel.)

You say it played in the Vogue and would you name the other theatre?

A. Orpheum, Belmont, Culver and El Rey.

Q. The Orpheum Theatre is downtown and the Belmont Theatre—— A. Belmont.

Q. The Belmont Theatre is located, according to this map, on Vermont Street just north of Third, is that right? A. Yes.

Q. And what is the next theatre?

A. Culver.

Q. That is the same theatre, and what is the next one? Any other theatres in that group?

A. El Rey.

Q. Now, at that time, Mr. Zabel,——

A. I note on here that this says “moveover and reissues” too. I don’t remember what the pictures were—whether they were first run or not. [259]

The Court: Just a minute. Now, we have a couple more terms here. What do you mean by “moveover”?

The Witness: Well, a moveover generally is a picture that moves from one theatre to another without any clearance between them—an immediate move. It closes in a first-run theatre one day and moves over to another theatre the next day.

The Court: And you also used another term.

The Witness: Reissue. It is an old picture they bring back. Maybe they played it a couple of years before, but they bring it back and run it again.

The Court: All right.

Q. (By Mr. Corinblit): Now, Mr. Zabel, call-

(Testimony of Edwin F. Zabel.)

ing your attention—this is true then, during the year 1949, Twentieth Century-Fox pictures were played generally in a unit in Fox Theatres, Universal was playing in a unit of Fox Theatres, United Artists Downtown and Loew's pictures were playing in a unit of Fox Theatres.

That is true for 1949, isn't that right?

A. Yes, I think that is true.

Q. All right.

The Court: May I ask a question?

Mr. Corinblit: Yes.

The Court: During this period of time were the Fox pictures playing in any other theatres other than a Fox theatre?

The Witness: I think only in the United Artists Theatre. [260]

The Court: With the exception of the United Artists Theatre Fox pictures played the Fox Theatres.

The Witness: Yes, sir.

Q. (By Mr. Corinblit): United Artists Theatre at that time was owned by Joseph Schenck and United Artists Theatre Circuit, Inc.? A. Yes.

Q. Now, earlier this afternoon, Mr. Zabel, the court was having you compare these theatres in 1950. In the unit that played in Fox houses generally was included the Loyola Theatre, isn't that right? A. Yes.

Q. Now, the Loyola Theatre actually grossed for the year 1950 more than some of the other Fox The-

(Testimony of Edwin F. Zabel.)

atres on Wilshire and Hollywood Boulevard for 1950, didn't they?

A. I don't know. I don't have the records here.

Q. Well, do you remember that the Loyola Theatre was a better theatre than the Uptown Theatre in 1949 and in 1950?

The Court: Mr. Corinblit, you mean better financially, from a financial standpoint?

Mr. Corinblit: From the point of view of gross receipts.

The Witness: No, but I would think it would be.

Q. (By Mr. Corinblit): Pardon me?

A. I think it would be.

Q. You think the Loyola would be better? [261]

A. Yes.

Q. And do you remember that the Loyola Theatre was a better theatre from the point of view of gross receipts than the El Rey Theatre on Wilshire Boulevard, don't you?     A. Yes, sir.

Q. And better than the Vogue Theatre on Hollywood Boulevard in 1950?

A. I don't know about 1950. I wouldn't say that.

Q. But you are not sure about 1950?

A. No, I am not.

Q. How about the Iris Theatre? The Loyola was a better theatre from the point of view of gross receipts than the Iris Theatre in 1950?

A. Well, I don't know. I would have to look at the record.

Q. Well, now, without regard to looking at the

(Testimony of Edwin F. Zabel.)

record, do you remember that it was a better theatre than the Ritz Theatre in 1950?

A. I wouldn't say as a theatre it is better. It depends on the picture.

Q. Well, now, the Loyola and the Uptown were playing the same pictures, weren't they?

A. Well, I said I think the Loyola outgrossed the Uptown.

Q. The Loyola will outgross the downtown and it is [262] located in the Westchester area and the other is on Wilshire Boulevard.

A. No, Western and Olympic.

Q. All right. In 1949, Mr. Zabel—I think you have testified that you supervised the buying of pictures in the Inglewood-Westchester area either directly or through people who worked for you. Now, did you learn in 1949 that there was an agreement between Fox, United Artists and another theatre, the La Tijera Theatre, to divide pictures in that area? Did you learn of that fact? A. No.

Q. You did not learn of it?

A. No. I know that they were playing pictures, but I didn't supervise or it was bought by Mr. Pirosh.

The Court: Will you keep your voice up?

The Witness: Supervised by Mr. Pirosh, bought by Mr. Pirosh.

Mr. Corinblit: You know, Mr. Zabel, that counsel for the defendants in this case have stated that that was a fact?

(Testimony of Edwin F. Zabel.)

The Witness: I didn't say it wasn't a fact. I said I didn't know anything about it.

Q. (By Mr. Corinblit): And you didn't know anything about it at the time?

A. No; I knew they were playing pictures, but I couldn't watch every theatre. [263]

Q. Well, did you know that to be a fact in 1950?

A. No.

Q. Did you know it to be a fact in 1951?

A. No.

Q. Mr. Zabel, did you know in 1951 that the La Tijera and Fox had agreed to split product?

A. No.

The Court: How far is the La Tijera Theatre from the Paradise Theatre?

The Witness: I believe—I would estimate it is about, between two and three miles.

Mr. Mitchell: I think the mileage is under two miles.

The Witness: Under two miles.

Q. (By Mr. Corinblit): Mr. Zabel, do you know of a case known as Fanchon and Marco, Inc. v. Paramount Pictures, Inc.?

A. Yes.

Q. Did you give a deposition in that case?

A. I don't remember whether I did or not.

Q. Do you remember that a deposition you gave in that case was read into evidence in that case?

A. No.

Q. All right. I will show you, Mr. Zabel, a transcript of the deposition that was read into evidence in this case and ask you to examine the question



(Testimony of Edwin F. Zabel.)

beginning with the words, "Now, did you know that the La Tijera and some of the [264] Fox-Inglewood Theatres shared the product of some of the distributors?"

I will ask you to read that question and then read that last answer.

Mr. Johnston: May I look at that?

Mr. Corinblit: Yes. [265]

Q. (By Mr. Corinblit): Now, does that refresh your recollection that in 1951 you did know that there was a split of product in 1951?

A. I didn't say anything about a split of product.

Q. I beg your pardon?

The Court: I am sorry. I can't hear you.

The Witness: I didn't say anything about a split of product.

Q. (By Mr. Corinblit): In that case, Mr. Zabel, were you asked this question and did you give this answer:

"Q. Did you know that the La Tijera and some of the Fox Inglewood theatres shared the product of some other distributors?

"A. I understand they do."

Did you give that answer?

A. I imagine that they all played the product from different distributors.

Mr. Corinblit: I will move to strike the answer.

The Court: The question is, did you make that answer?

(Testimony of Edwin F. Zabel.)

The Witness: Apparently I did. It is my deposition here. I apparently did.

Q. (By Mr. Corinblit): You did state that?

A. Yes.

Q. Were you asked this question: [266]

"Q. Did you understand that Bert Pirosh laid off bidding on some situations so as to permit Bill Kupper at the La Tijera to get some pictures from some other distributors?

"A. You mean recently?

"Q. No, some time ago. "A. I don't.

"Q. You don't? "A. No.

"Q. Have you ever talked to Bert Pirosh about the La Tijera situation at all?

"A. No. I just understood this morning that they stopped a certain amount of bidding in Inglewood. That's all I know."

Did you give those answers?

A. I guess I did if they are in here. I am sure I did.

Q. Then you did know in 1951 at that time Fox and La Tijera were dividing pictures in the Inglewood-Westchester area?

A. I didn't say that in the book, either.

The Court: Read the question. Now, answer the question. If you don't know, say so.

(Question read.)

The Court: You can answer that question.

The Witness: I don't know what he means by dividing pictures. [267]

Q. (By Mr. Corinblit): Do you know what is

(Testimony of Edwin F. Zabel.)

meant to divide pictures? A. No.

Q. You don't know?

The Court: Did you know what was meant in the previous case?

The Witness: I understand from what I can understand in buying pictures, I figure they were all playing different companies' pictures. If he said split pictures, I might know what he meant.

Q. (By Mr. Corinblit): When the question was asked you, did you know the La Tijera and some of the Fox Inglewood theatres shared the product of some of the distributors?

"A. I understand they do."

And when you answered:

"Q. Have you ever talked to Bert Pirosh about the La Tijera situation at all?

"A. No. I just understood this morning that they stopped a certain amount of bidding in Inglewood. That's all I know."

What did you mean when you said you understood this morning that they stopped a certain amount of bidding? Wasn't that the equivalent of split of product?

A. Not necessarily. [268]

Q. Was it that they agreed not to bid against each other?

A. That doesn't mean a split of product.

Q. But it does mean that they agreed not to bid against each other?

A. I don't know what you mean by what they agreed to, whether they stopped bidding. It is the

(Testimony of Edwin F. Zabel.)

difference between bidding and the distributor selling product to the theatres.

Q. How long had this matter with respect to—this testimony was given in June 1951. How long prior to June 1951 had this same arrangement been made?

A. I don't know because I didn't handle the arrangements at all. Mr. Pirosh handled all their bidding situations.

Q. He was operating under your supervision?

A. Yes, but he did the work.

Q. He didn't report this matter to you?

A. No, sir, it isn't necessary.

Q. You mean you never learned about it?

A. He did not report it. That was his job.

Q. But you learned about it when you testified in the deposition in 1951, isn't that right?

A. I think your question is confusing. I don't know whether I am answering right or not, but I didn't have anything to do with it at all.

Q. Mr. Zabel, in fact, you know that there was a split [269] of product in which the distributors were involved with the exhibitors in the Inglewood area from 1949 up through June 1951, when you testified in this deposition, isn't that correct?

A. I don't know whether there was split of product there or not.

The Court: May I ask a question?

Mr. Corinblit: Yes.

The Court: Will you please tell the jury what

(Testimony of Edwin F. Zabel.)

you mean by split of product? We have been using that term.

The Witness: Split of product is where a distributor sells some of his product to one theatre and agrees to sell some of it to the other theatre. In other words, they may sell any number of pictures. They may sell them half, they may sell them 25 per cent or they may sell 10 pictures to one theatre, and sell the rest to the other. That is split of product.

The Court: Then if a distributor sells a picture to more than one theatre, then that is a split of product, is that right?

The Witness: I believe just one picture would be considered a split of product, but generally it is more.

The Court: One or more pictures.

The Witness: Yes.

The Court: He sells a picture to more than one theatre. [270]

The Witness: Yes.

The Court: That is a split of product?

The Witness: Yes.

Q. (By Mr. Corinblit): What did you mean when you said they stopped a certain amount of bidding in Inglewood? Who stopped a certain amount of bidding?

A. Evidently the distributors.

Q. The distributors did? A. Yes.

Q. In June 1951?



(Testimony of Edwin F. Zabel.)

A. I don't know the date, but I imagine they stopped, they agreed to stop it.

Mr. Johnston: Mr. Corinblit, you are reading something, the date of which is June 1951. As far as the witness is concerned from what you are reading, he isn't talking about 1951 necessarily. He is talking about some other period of time. I think it would be well if you made that clear.

The Court: When was the deposition taken?

Mr. Corinblit: In June of 1951, your Honor, and the questions and answers referred to this current period. Those are the questions in the record.

Mr. Mitchell: Now, the deposition couldn't have been taken in June 1951. We were on trial at that time.

The Court: It is possible, however, I have found [271] out, to take depositions while we are on trial.

Mr. Johnston: Your Honor, I was present at the deposition. It was taken months before the trial.

The Court: What does the record show?

Mr. Corinblit: "Mr. Reich: We will read from the deposition of Edwin F. Zabel, taken June 7, 1951."

Q. Now, Mr. Zabel, it was the policy, wasn't it, as far as Fox was concerned in 1951, to work out splits of product with the distributors and competing exhibitors?

A. That was the policy long before that.

Q. I beg your pardon?

A. Perhaps the policy long before that.

Q. That had been the policy a long time?

(Testimony of Edwin F. Zabel.)

A. There were splits worked out.

Q. Between Fox and competitors?

A. Distributors were agreeable to selling part of the product to one theatre and another part of the product to another theatre. I don't happen to know very much about this particular Inglewood area. I didn't have anything to do with it.

Q. But it was the policy of Fox to work out those arrangements, wasn't it?

A. It wasn't a policy of Fox. They worked out some situations where the distributor agreed to sell some to Fox [272] and some to other theatres, if that is what you mean.

Q. As part of those arrangements, the distributor was committed to sell to one theatre certain pictures and to sell to the other theatre the other pictures, isn't that right?

A. I don't know what you mean by one theatre some pictures—well, that is what I said.

Q. That was a commitment on their part.

A. What do you mean by commitment?

Q. By the distributors. [273]

\* \* \* \* \*

Q. Mr. Zabel, yesterday at the end of the day you were describing some matters and I want to describe another fact situation for contrast purposes. [281]

In your business as chief film buyer of Fox in 1949, 1950 and 1951, did you know of an arrangement in Inglewood whereby among the eight major film companies the product of certain companies

(Testimony of Edwin F. Zabel.)

was allocated to certain theatres and certain theatre divided the product of the distributors among themselves? Did you know of such an arrangement?

A. No.

Q. Do you refer to that kind of an arrangement as a split of companies or an allocation of product? Is that how that is referred to in the business?

A. No. If there is a—I imagine if there is a certain company's products or a portion of it allocated to the theatres by the distributors, we refer to it as a split.

Q. Looking at it from the point of view of the theatre, the arrangement I am describing is where a group of theatres get together and agree to divide the product of the film companies in a certain way, that is, they agree among themselves who is to get what pictures of what companies, and then the distributors go along with and enter into that arrangement. Do you have a term for that kind of an arrangement?

A. No. I don't think there is a term that I know of.

Q. There is no specific term?

A. If that happens, I don't know of any term.

Q. Did you know of the existence of such an arrangement in the Inglewood area? [282]

A. No, I did not.

Q. You never knew about that? A. No.

Q. Mr. Pirosh never told you about it?

A. No.

Q. Now, having in mind that same kind of an

(Testimony of Edwin F. Zabel.)

arrangement, did you know of an arrangement as part of that deal in the Inglewood area whereby the film companies, despite the arrangements as to what theatres would get what pictures, sent out bid letters? Did you know there was such an arrangement?

A. I know there was bidding in the Inglewood area.

Q. You just know there was bidding?

A. Yes.

Q. You don't know that there was an advance arrangement as to who was to get the pictures even before the bids were sent out?

A. No, because Mr. Pirosh was assigned to all bidding situations, and that came under his jurisdiction.

Q. So if anybody knows about it, it is Mr. Pirosh?

A. Yes.

Q. You didn't discuss that with Mr. Bertero?

A. No.

Q. Or Mr. Bowser? A. No. [283]

Q. Who was Mr. Bowser, by the way, in 1949, 1950 and 1951?

A. Mr. Bowser was the general manager of Fox West Coast Theatres.

Q. Now, we were talking yesterday, too, about the product that Fox was playing first run in 1949, that is the product of Loew's, Twentieth Century-Fox, and Universal. Did you try to get RKO pictures on a general basis in 1949 on behalf of Fox?

(Testimony of Edwin F. Zabel.)

A. I don't know what you mean by on a general basis.

Q. That is, did you try to get them regularly for the Fox theatres? A. No, I don't recall.

Q. You don't recall? A. No.

Q. Do you remember where RKO pictures were playing in 1949?

Mr. Mitchell: On what run, your Honor?

Mr. Corinblit: First run Los Angeles.

The Witness: I think the RKO played their pictures in the RKO Hillstreet and Pantages Theatre in Hollywood generally.

Q. (By Mr. Corinblit): In 1949, 1950 and 1951, did you on behalf of Fox try to get Columbia pictures on a regular basis for Fox theatres first run Los Angeles? [284]

A. I don't recall trying to get them. I believe we played a Columbia picture. I don't remember what year it was, though.

Q. Do you remember where Columbia pictures were playing regularly in 1949?

A. I think—well, I don't know for sure where they were playing, but I believe they played some in the RKO Downtown and the Pantages.

Q. Just some of them, you think?

A. As far as I recall.

Q. Did you try to get in 1949, 1950 and 1951 any of the Warner pictures first run Los Angeles on a regular basis?

A. I don't believe so. I think they played—

Q. Did you try to get any of the Paramount—



(Testimony of Edwin F. Zabel.)

Mr. Mitchell: I didn't hear the last part of the answer.

The Witness: I don't believe so.

Q. (By Mr. Corinblit): Did you try to get Paramount product on a regular basis?

A. I believe we played some Paramount product, yes, but I don't remember what year it was.

Q. You don't have any recollection whether in 1949 you tried to get Paramount on a regular basis?

A. No.

Mr. Corinblit: I would like to offer in evidence, [285] if the court please, the play-off of Warner pictures for the period 1949 to 1951, RKO pictures first run—this is all first run—1949 to 1951, and Columbia pictures 1949 to 1951, at this time that group.

I will ask that the Warner play-off be marked as 46-A-7, the RKO be marked as 46-A-8 and the Columbia schedule be marked as 46-A-9.

Mr. Mitchell: Your Honor, I wish to object to the Columbia and RKO schedules upon the ground that they are immaterial. Those companies are not defendants in this case. What they did with respect to first run has nothing to do with the issues.

The Court: That may be perfectly true, but supposing Fox was able to corral the entire market?

Mr. Mitchell: That would have nothing to do with this case because the market for RKO and Columbia pictures is not a part of the issues of the case.

(Testimony of Edwin F. Zabel.)

The Court: It might show Fox control of the entire market.

Mr. Mitchell: Yes, but they are not charged with the control of RKO or Columbia market.

The Court: Objection overruled.

The Clerk: Exhibits 46-A-7, -8, and -9. [286]

(The exhibits referred to were received in evidence as Plaintiff's Exhibits 46-A-7, 46-A-8, and 46-A-9.)

Mr. Corinblit: I will ask that there be marked for identification as an exhibit United Artists play-off for 1949 to 1951.

Mr. Mitchell: Same objection, your Honor.

The Court: Same ruling.

Mr. Corinblit: As 46-A-10.

The Clerk: Is this in evidence or for identification?

Mr. Corinblit: Are these admitted in evidence?

The Court: I don't presume there is any question as to authenticity of the exhibits.

Mr. Corinblit: No, sir, there is not.

The Clerk: 46-A-10.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 46-A-10.)

Q. (By Mr. Corinblit): Now, Mr. Zabel, in 1949 and 1950 did the film company people for Columbia solicit your company to exhibit Columbia pictures on a regular basis in the Fox houses?

A. I don't remember exactly. I believe we played

(Testimony of Edwin F. Zabel.)

some. I don't know whether it was that year or not. I don't know whether they solicited us or we solicited them. [287]

The Court: You testified yesterday that Universal solicited them.

The Witness: Yes, Columbia.

The Court: Columbia.

The Witness: Yes.

The Court: Universal actually solicited the pictures, but you don't remember whether Columbia solicited or not.

The Witness: As I recall, we did play a Columbia picture. There is one I happen to recall, but I don't remember whether it was in the year 1949 or 1950.

Q. (By Mr. Corinblit): Now, turning for a moment to the RKO picture. RKO solicited Fox to exhibit their pictures on a regular basis in 1949, did they not?

A. I don't remember. I don't believe so.

Mr. Mitchell: You are still talking about first run?

The Witness: Yes.

Mr. Corinblit: Yes, first run.

Q. (By Mr. Corinblit): Did the Warner Company solicit Fox to exhibit their pictures on a regular basis first run? A. I don't recall.

Q. And did the Paramount Company solicit Fox to exhibit their pictures on a regular basis first run?

A. I believe we played some Paramount pic-

(Testimony of Edwin F. Zabel.)

tures. Whether they solicited us or we them I don't remember. I don't remember whether it was in 1949 or 1950 or prior to that. [288]

Q. With respect to the Paramount pictures my question is, did they solicit you to play their pictures on a regular basis in the Fox Theatres?

A. I don't understand what you mean by a regular basis.

Q. Well, I know that you played a Paramount picture now and again or you might play a Warner picture now and again or perhaps even RKO picture now and again, but my question is whether on a regular basis they regularly, as their pictures came out, came to Fox and said, "Will you play our picture, will you play our picture"?

A. I don't believe so.

Q. And that same answer is true as to RKO and the same answer is true as to Columbia and the same answer is true as to Warners and the same answer is true as to Paramount, is that right?

A. I believe so, yes.

The Court: May I ask a question?

Mr. Corinblit: Certainly.

The Court: During this period of time was there enough Fox pictures to take care of your needs or was it necessary to get pictures from the other companies?

Mr. Mitchell: First run.

The Witness: Generally, I believe, we had enough [289] Fox pictures to take care of our needs.

The Court: It was only now and then, if you

(Testimony of Edwin F. Zabel.)

didn't have enough Fox pictures that you went out and got pictures from some other company, is that right?

The Witness: That is true.

Q. (By Mr. Corinblit): It is true, Mr. Zabel, is it not, that when you bought pictures in operating your buying policy, you were trying to make as much money as you could for the Fox Theatres, isn't that correct? A. That is correct.

Q. And there were times when there were very good pictures of Warners or RKO or Columbia or Paramount that would have helped you make more money in your Fox Theatres than to play the pictures you had, isn't that true?

A. Well, Fox Twentieth Century — Twentieth Century-Fox owned the Fox West Coast Theatres and they wanted an outlet for their pictures and they used their own theatres first.

Q. Now, let us talk about the theatres that weren't playing Twentieth Century-Fox product in 1949.

Let us talk about it at a time prior to November 1949. You owned Loew's State Theatre. You owned the Egyptian Theatre and you owned the Wilshire Theatre on Wilshire Boulevard. They weren't playing Fox product, were they, regularly, if at all? A. In 1949? [290]

Q. Yes.

A. Well, I don't recall just when.

Q. Perhaps you would want to take a look at the Loew's play-off.



(Testimony of Edwin F. Zabel.)

I show you Exhibit 46-A-4, Mr. Zabel, 1949, and show you with respect to Loew's pictures that you were playing in the Los Angeles, Wilshire and Egyptian, isn't that true?      A. Yes.

Q. Now, those theatres, with respect to those theatres certainly there were occasions when there were pictures of Paramount or Warner or Columbia or RKO which, if you had had them, you might have made more money than you made just playing those pictures, isn't that right?

A. I don't know. Looking at the titles of these pictures they were some of the best pictures made during that year.

Q. That is the Loew's pictures?      A. Yes.

Q. Now, were they all the best pictures—was it true all the time you had the best pictures in the house that you could get?

A. I don't think so, but I don't know that we could get all the best pictures.

Q. The question is did you try to get the best pictures from Warners, from RKO, from Columbia, from Paramount? [291]

A. No.

Q. Now, wasn't that against the best interests of your company?      A. Not necessarily.

Q. It wasn't against the best interests of your company if you didn't try to get the best pictures you could, is that the arrangement?

A. No, it is not necessarily to make the most money on the best pictures all the time.

Q. What other standard did you have of buying

(Testimony of Edwin F. Zabel.)

pictures for Fox at that time other than trying to make the most money?

A. Fox owned the Fox Theatres and they wanted to play their pictures in the Fox Theatres.

Q. Now, Mr. Zabel——

A. Is that what you want?

Q. I am referring to those theatres that did not play Fox product.

My question is, other than trying to make the most money for Fox, and you have testified that that necessarily wasn't the standard because you didn't go after the best pictures from the other companies, now I want to know what else you were trying to do other than trying to make the most money for Fox.

A. I was trying to make the most money for Fox.

Q. Yet you did not go after the best pictures from [292] these four companies, isn't that right?

A. You don't always make the most money on the best pictures.

Q. Now, as a matter of fact, in not going after this product, you didn't even know what terms you could get from these companies for their pictures?

A. We had enough pictures that we thought we could buy from the company and they were satisfactory and we made substantial money on them.

Q. Now, it is a fact, isn't it, Mr. Zabel, that the reason you didn't go after the product of these four companies is that in Los Angeles in 1949 there was an arrangement whereby Fox would not try to get

(Testimony of Edwin F. Zabel.)

the pictures of these companies and the theatres that were playing those companies' product would not try to get the pictures that Fox was playing, isn't that correct?

A. I don't know of any arrangement.

Q. You don't know of any such arrangement?

A. No.

Q. As a matter of fact, that exact arrangement was in force in Los Angeles at least from 1945 to 1949, isn't that correct?

A. I don't know of any arrangement.

Q. Now, did you know that Warners or did you learn that Warners, the Warners Theatres never tried to get Loew's [293] pictures in 1949? Did you know that? A. No, I didn't know that.

Q. Did you know that the RKO Theatres never tried to get Loew's pictures in 1949? A. No.

Q. Did you know that the Paramount houses in this area never tried to get any Loew's pictures in 1949?

A. Well, I believe that these companies had their own— owned their own theatres at that time except the Paramount, and I believe Paramount had a franchise with those theatres.

The Court: The question is not what you believe. The question is do you know.

The Witness: I know.

The Court: All right.

Q. (By Mr. Corinblit): Now, with respect to Universal pictures that you testified the Fox Theatres played over a period of five years, you know,

(Testimony of Edwin F. Zabel.)

don't you, that the RKO Theatres never tried to get those Universal pictures during that period, don't you?

A. Well, I don't know whether they tried to get them or not, but I do know Mr. Scully wanted a group of theatres from us and he wanted those theatres to play his pictures.

Q. And year in and year out from '49 to '50 RKO never tried to get Universal pictures for their theatres, isn't that correct? [294]

A. Well, as I understand they thought they weren't good box office pictures and wouldn't play them.

Q. RKO thought they weren't good box office pictures?     A. I understand that.

Q. None of the Universal pictures, they thought, were good box office pictures?

A. They just couldn't pick the good ones.

Q. Even with respect to the good pictures RKO didn't try to get those pictures?

A. I don't know if they did or not.

Q. You know that you never had to compete with RKO for Universal pictures?

A. Because Mr. Scully wanted to sell them to our theatres when he asked for them.

Q. RKO never tried to interfere with that?

A. I don't know.

Q. Warners never tried to interfere with that?

A. I think Warners was in the same position we were when we got Fox productions, because War-

(Testimony of Edwin F. Zabel.)

ners owned their theatres and wanted their pictures played in their theatres.

Q. My question is simply whether or not you know Warners never tried to interfere with Fox—that Fox had Universal pictures for that five-year period?

A. I don't know what Warners did.

Q. Now, Mr. Zabel, we now have in evidence the play-off [295] from all of the companies, all eight companies from 1949 through 1951.

Now, I wonder if you can answer this question. In 1949 isn't it a fact that if Fox bought a picture first run in this city of Los Angeles that your company would not permit any other independent theatre or any other theatre to play that picture first run with the single exception of the United Artists Theatre downtown. Isn't that true?

A. I think that is correct.

Q. And isn't it a fact that that policy, on behalf of Fox, existed not only in 1949 but at least from 1945 on?

Mr. Mitchell: I object to the earlier date, your Honor. He keeps trying to slip back into earlier periods and I think they are immaterial in this lawsuit.

The Court: Objection overruled.

The Witness: Fox owned the pictures and owned the theatres and they played their pictures in their theatres.

The Court: That is not the question. I assume that if Fox had the right to play pictures first run



(Testimony of Edwin F. Zabel.)

in Los Angeles that Fox objected to any other company playing first run of those pictures.

The Witness: Any other theatre in the metropolitan area.

The Court: It was an exclusive right, was it not?

The Witness: Yes, sir. [296]

The Court: It was an exclusive right and Fox insisted it be exclusive.

The Witness: That is true.

The Court: Nobody else could play the picture.

The Witness: That is true.

Q. (By Mr. Corinblit): Now, Mr. Zabel, we were talking yesterday about downtown Los Angeles first run.

I want to get absolutely clear that you remember in 1949 when the Fox Theatres were playing Loew's pictures first run, that is Egyptian, the Wilshire and the Los Angeles, you were not bidding for Loew's pictures at that time. There was no bidding set up in 1949?

A. I don't believe we were.

Q. Now, do you know Mr. Joseph Schenck, Mr. Zabel?

A. Yes, sir.

Q. And who did you know Mr. Schenck to be in 1949?

A. I believe at that time he was head of the United Artists Theatre Circuit.

Q. What connection did he have with the defendant Fox West Coast?

A. Fox West Coast?

(Testimony of Edwin F. Zabel.)

Q. Yes.

A. I don't believe he had any connection with Fox West Coast.

Q. 1949, Mr. Zabel. [297]

A. I believe—was that when—we were still operating in the United Theatres?

Q. Yes. Now, what connection did he have with your company when you were doing that?

A. Didn't have any connection with our company. He owned United Theatres Circuit, owned a portion of the group of theatres that were in the United West Coast Theatres.

Q. And in addition to owning a portion of the theatres that were in that circuit—I will withdraw that.

Now, do you know what connection he had with Twentieth Century-Fox, what other connection—did you know him to have any connection with Twentieth Century-Fox in 1949?

A. Well, I think he was—I don't know what his title was, but he worked for Twentieth Century-Fox at the studio.

Q. And what was his responsibility, if you know?

A. I imagine the studio was his big responsibility. I don't know what his responsibilities were, but I imagine he was one of the executives at the studio.

Q. He was one of the executives?

A. Yes.

Q. So Mr. Schenck at the same time was an ex-

(Testimony of Edwin F. Zabel.)

ecutive at the studio and at the same time had the interest in the group of theatres that you and his company operated jointly, is that right?

A. Well, I guess he was a stockholder in the United [298] Artists Theatres, yes. I don't know whether he owned it.

Q. And his company and your company operated these theatres jointly, isn't that right?

A. Our company operated them.

Q. Your company operated them?

A. Yes.

Q. His company, however, was represented on the board of directors, weren't they? [299]

Mr. Mitchell: Of what company?

Mr. Corinblit: Of the company operating the United Artists-Fox West Coast circuit of theatres.

The Witness: Well, I don't remember. I think the Service company was operating the theatres, if I am not mistaken.

Q. (By Mr. Corinblit): But his company was represented on the board of directors, though, of the company owning the Fox-United Artists circuit of theatres?

A. I believe they were on the United West Coast Theatres. I believe he had some directors.

Q. On the board of directors? A. Yes.

Q. How about officers? A. I don't know.

Q. Don't you remember that they had representatives among the officers?

A. No, I don't remember.

Q. Mr. Zabel, I think yesterday you testified

(Testimony of Edwin F. Zabel.)

that the Loyola Theatre, that you would have expected the Loyola Theatre to be a better theatre in terms of gross receipts than the Uptown Theatre.

Do you remember the approximate seating in the Uptown? A. About 1700 seats. [300]

Q. 1700 seats, and do you remember the approximate seating in the Loyola?

A. Around 1200.

Q. Around 1200. So there was 500 seats more in the Uptown than there were in the Loyola Theatre, right? A. Yes.

Q. Then you testified that the Loyola Theatre was a better theatre than the Uptown. I take it that if the Paradise Theatre—do you know the Paradise Theatre?

A. Yes, I know where it is.

Q. That is just two or three blocks from the Loyola, isn't it? A. I believe so.

Q. It was built in 1950 and the Loyola was built in 1945?

A. I believe those are the approximate dates.

Q. And from a physical point of view, it is at least as handsome and as comfortable and as good a theatre, from a physical point of view, as the Loyola, certainly, isn't that right?

A. I don't know whether it is or not.

Q. Have you ever been in the Paradise?

A. Yes.

Q. Don't you have an opinion on that point?

A. Yes. I think our theatre is pretty nice. [301]

(Testimony of Edwin F. Zabel.)

Q. I am sure you would think that. The question is whether you are willing to admit that the Paradise is just as nice as the Loyola, if not nicer.

A. I don't know whether it is nicer. I don't know about a comparison. I know our theatre is very nice and the Paradise is a newer theatre.

Q. You would expect the Paradise Theatre to be a better theatre than the Uptown Theatre, too, wouldn't you?      A. I don't know.

Q. Now, Mr. Zabel, yesterday in answer to the court's questions at the end of the day with respect to the Universal deal, you remember you testified you made a deal with Mr. Scully, and as a result of that deal you had Universal product for over a period of five years.

I want to ask you first, do you know as a matter of fact whether or not before you had the discussion with Mr. Scully, Mr. Skouras had had a discussion with the president of Universal.

A. No.

Q. You don't know that one way or the other?

A. No.

Q. You don't know whether that had been worked out even before you had a conversation with Mr. Scully?      A. No.

Q. After you testified as to the arrangement and the [302] result, that you had five years of product of Universal, the court asked you some questions about the terms, and I think you testified that each picture coming off the line was



(Testimony of Edwin F. Zabel.)

negotiated for separately, except that you would say that maybe sometimes you would negotiate for five pictures at a time.

Was that your testimony, that you negotiated each picture separately?

Mr. Mitchell: What his testimony was is in the record, your Honor. I don't think that is a proper question. I object to it on that ground. What his testimony is is in the record.

Mr. Corinblit: I thought I would save time by not——

The Court: My recollection of the testimony was that some previous time they had negotiated the pictures in groups of five at a time or for a season, but at the present time they were negotiating one picture at a time.

Mr. Corinblit: That is during the period of time Mr. Zabel was talking about.

The Court: That is 1949, 1950 and 1951. That is my understanding of the testimony.

Q. (By Mr. Corinblit): Is that right?

A. I believe that is true. As far as I remember, if was in 1950 and 1951 we negotiated one picture at a time for each theatre.

Q. What do you mean by the word negotiate as you use [303] it there? Do you mean you would start out with one figure and the film companies would start out with another figure, and then when you were all through, you might work out something in the middle or work out another figure is that what you mean?

(Testimony of Edwin F. Zabel.)

A. It could possibly be, yes.

Q. That is what you mean by the term negotiate? A. Yes.

Q. First, Mr. Zabel, let me ask you a question. Isn't it a fact that contrary to that agreement you had an agreement with Universal in 1949, 1950 and 1951 that virtually every picture that was to be played in the Fox theatres was to be played on a particular term, specific term?

A. No, I don't agree with that.

Q. Didn't you have an agreement that virtually every picture was to be played on a 20 to 40 per cent sliding scale?

A. Generally a sliding scale didn't vary as far as 20 to 40 per cent, but the figures might vary, depending on the year they were playing.

Q. Now, my question is as to the terms, not the result. The fact is that you had an understanding with them that every picture coming off, with very, very rare exceptions, would be played at fixed terms, 20 to 40 per cent sliding scale, and we will go into what that means in a minute—isn't that a [304] fact?

A. We generally played most pictures on a sliding scale.

Q. I am talking about a particular sliding scale, 20 to 40 per cent sliding scale.

A. Most all sliding scales were 20 to 40 per cent, as I recall.

Q. Then it was your understanding you did have an arrangement with Universal that every

(Testimony of Edwin F. Zabel.)

picture coming off would be played at 20 to 40 per cent sliding scale? A. No, we did not.

Q. With rare exceptions.

A. Some were played flat rental.

Q. How many would you say were played flat rental? More than three?

A. Generally we played double bill. Sometimes there was a flat rental price negotiated for the pictures and there may have been some situations where they played two pictures on one scale, too. I don't recall. I would have to check the record.

The Court: Mr. Witness, let's stop a minute. Isn't it true when you play a double bill, the lower half, the poorer picture, you played that usually on a flat basis?

The Witness: Generally we do.

The Court: And the top of the bill, the better picture, [305] is played on a sliding scale basis?

The Witness: Yes.

The Court: So when you say the poorer picture from Universal was played at the bottom half of the bill, it was on a flat basis as a general rule?

The Witness: As a general rule, but there are occasions when you put them on one sliding scale, two pictures for the percentage, and they divided that up the way they wished. I don't recall whether any of these pictures played that way or not. I would have to check the records to see if they were all on the same 20 to 40 per cent.

Q. (By Mr. Corinblit): I want to give you a chance to check your records right now, Mr. Zabel.

(Testimony of Edwin F. Zabel.)

Mr. Corinblit: I will show counsel the cut-off cards of Universal in the Ritz Theatre, 1949-50, and I believe 1950-51, and United Artists—I will describe these by series—United Artists series pictures 101, series pictures 621, and series beginning 681, and the series beginning 901.

I ask that the four in that group for the United Artists Theatre downtown be marked as a single exhibit next in order, Exhibit 47-A.

Mr. Johnston: What theatre?

Mr. Corinblit: United Artists Theatre.

Mr. Johnston: What period of time? [306]

Mr. Corinblit: Roughly the period is 1949 through 1951, and I will ask that these——

Mr. Johnston: I am going to object to the introduction——

The Court: Just a minute. He is trying to identify the exhibits.

Mr. Johnston: All right.

The Clerk: Mr. Corinblit, the other will be 47-A-1.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 47-A-1 for identification.)

Mr. Corinblit: The United Artists group will be 47-A-1.

I will ask that the cut-off cards for Universal for the Ritz Theatre, series 681 and the series beginning 901 be marked as 47-A-2.

The Clerk: 47-A-2.

(The exhibit referred to was marked as

(Testimony of Edwin F. Zabel.)

Plaintiff's Exhibit No. 47-A-2 for identification.)

Mr. Corinblit: Then I will ask that the cut-off cards for the Guild Theatre with series 681 be marked as 47-A-3.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 47-A-3 for identification.)

The Court: Which was the first theatre?

Mr. Corinblit: The first one was the United Artists [307] downtown, the second was the Ritz Theatre, and the third was the Guild Theatre.

Counsel, I will show you the exhibits marked 47-A-2 and 47-A-3.

The Court: These are just for identification.

Mr. Corinblit: Yes, just for identification.

At this time, your Honor, I would like to offer in evidence Exhibits 47-A-2 and 47-A-3.

Mr. Johnston: Those are what theatres?

Mr. Corinblit: The Ritz and the Guild Theatres.

Mr. Johnston: I have no objection to any of them with the exception of the United Artists, which is not a Fox West Coast operation.

The Court: 47-A-2 and 47-A-3 will be received in evidence.

The Clerk: Exhibits 47-A-2 and 47-A-3.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 47-A-2 and 47-A-3.) [308]

The Court: 47-A-2 and 47-A-3.



(Testimony of Edwin F. Zabel.)

Q. (By Mr. Corinblit): Now, the Ritz Theatre was a Fox theatre in 1949, '50 and '51?

A. Yes.

Q. Mr. Zabel, I will ask you to look at Exhibit 47-A-2 and I will take this subject to correction of counsel, is a cut-off card for Universal for the Fox, Ritz Theatres. Perhaps, may I explain what a cut-off card is, your Honor?

The Court: Yes. I think the witness should explain it or you should or you can stipulate as to what it means.

Mr. Corinblit: I think we can stipulate as to what a cut-off card is. We have done it before.

A cut-off card, ladies and gentlemen of the jury, is a record which the film company keeps of each picture that it distributes.

Ordinarily a cut-off card is set up for each particular theatre, and for that theatre they have the list of all of the pictures that they are releasing in a given season— one card for '49 for the Ritz Theatre, one card for '50 for the Ritz Theatre, one card for '51 for the Ritz Theatre and so on.

On the cut-off card they have the name of the picture and then the terms that have been negotiated — that is what the terms were that the parties agreed to pay for the film. [309]

They also have the date on which the picture was played and then finally they will have the amount of money actually paid by the theatre for the picture.

The Court: Is that stipulated to?

(Testimony of Edwin F. Zabel.)

Mr. Westbrook: Just a moment, if your Honor please.

Your Honor, that description is generally acceptable except I think counsel will agree that the terms are not always complete as shown on the distributor's cut-off card, and it is very frequently necessary to refer to the film licensing agreement to determine, for example, that would be true in the case of a sliding scale because you wouldn't know what the scale was from the cut-off card. You would have to go to the individual scale for each theatre as shown on the film licensing agreement.

Is that not correct, counsel?

Mr. Corinblit: That is sometimes true, yes. You do not have on the cut-off card the actual scale.

Mr. Westbrook: That is true in all instances with a sliding scale.

Mr. Corinblit: Yes. And when referring to a sliding scale they are referring to a term outside of the cut-off card, but we will explain that to the jury a little fuller.

Q. Now, looking at Exhibit 47-A-2——

Mr. Johnston: Will you make clear that these documents are Universal documents and not Fox West Coast? [310]

Mr. Corinblit: These documents are maintained by the film company and not by Mr. Johnston's client, the Fox West Coast Company.

They have separate records. They have their own records that have the same data.

(Testimony of Edwin F. Zabel.)

Mr. Johnston: I think that is an assumption that may be unwarranted.

The Court: Have similar data. Let us put it that way.

Mr. Johnston: Maybe.

Q. (By Mr. Corinblit): Mr. Zabel, Plaintiff's Exhibit 47-A-2 shows that during the '48 to '49 season there were played in the Ritz Theatre roughly eight pictures on first run—28 pictures.

Mr. Westbrook: 28 Universal pictures.

Mr. Corinblit: Yes, 28 Universal pictures.

The Court: Mr. Corinblit, let us stop now and define what you mean by "season." You said "'48-'49 season" and let the jury understand what you are talking about by "season."

Mr. Corinblit: In the motion picture business the customary season in the past has been, although there is some variation now I believe, to figure the motion picture season from September of 1949 to August 31 of the following year. It is a fiscal year. Beginning in the fall and running to the next fall. [311]

They don't begin from January 1 to January 1, but from September 1 to September 1. That is called a "season," and since they overlap two years you would have to call it the '48-'49 season or '49-'50 season.

I am now referring to the '48-'49 season.

Q. Now, of those pictures, Mr. Zabel, of this approximately 28 pictures, 26 of them played on

(Testimony of Edwin F. Zabel.)

the exact same scale agreement, 20 to 40 per cent sliding scale.

Two of them played at flat rental and the flat rental was the same, \$400 for the year.

The Court: Wait a minute. Let the witness say "Yes" or "No." Don't you do the testifying.

Mr. Corinblit: Yes, your Honor.

Mr. Mitchell: May he explain his answer also?

The Court: Yes, he may explain if he wishes to.

The Witness: This is not complete. It says here from 40 to 20 per cent, but I do not know what the increments are in the sliding scale. The increments can vary.

Q. (By Mr. Corinblit): All right.

A. Depending on the basic expense.

The Court: As far as that record is concerned it shows the same sliding scale.

The Witness: This shows that the percentages vary from 40 to 20 per cent on a sliding scale but the sliding scale may be different on each picture.

Q. (By Mr. Corinblit): As far as this record is concerned itself, it shows 20 to 40 per cent sliding scale, isn't that right?      A. Yes.

Q. Now, for the next year, for the year '50-'51 there are approximately 32 pictures that are played and with the exception of three pictures, which are each played for \$400, every single one of them is 20 to 40 per cent sliding scale, is that correct?

A. Yes, however, generally the increment change may be set up for a year because they are based on a basic figure and they were generally re-set up each



(Testimony of Edwin F. Zabel.)

year, depending on the different costs and the basic figures in each theatre.

Q. Depending on the expenses in the theatre?

A. Not necessarily expenses alone. It may have been based on an agreed figure.

Q. Not based upon the value of the picture though? A. No.

Q. Had nothing to do with the picture—it was just the expenses of the theatre?

A. Expenses or agreed figure on the theatre.

Q. All right. Now, I want to show you Plaintiff's Exhibit 47-A-3, which is the Guild Theatre, and call your attention that there were approximately 25 pictures played—less than that, I think probably about 20 pictures played at [313] the Guild, and of those pictures all but three were played on the 40 to 20 per cent sliding scale, is that correct? A. So this statement says.

Q. All right.

Mr. Corinblit: Now, your Honor, I would like to offer into evidence at this time the Exhibit 47-A-1, which are the cut-off cards for Universal for the United Artists Theatre downtown.

The Court: Do we have an objection?

Mr. Johnston: I object to that on the ground it was not a Fox West Coast operation after 1947.

I don't know that this witness has any knowledge with regard to the terms of pictures negotiated for that theatre between Universal and United Artists Theatres Circuit.

That is the basis of my objection, your Honor.



(Testimony of Edwin F. Zabel.)

Mr. Corinblit: My answer is, your Honor, that these records are designed to show that there was an over-all arrangement as to terms.

Now, the record evidence shows that all of the Universal pictures played in a unit of theatres, four Fox theatres and United Artists Theatre downtown, so this evidence would tend to show and assist, I believe, in tending to show there was an over-all arrangement as to terms by looking at it collectively. If they don't vary, it doesn't make any sense. If there was any—— [314]

The Court: Objection overruled.

Q. (By Mr. Corinblit): Now, Mr. Zabel, the court having admitted——

The Court: It may be admitted in evidence, Exhibit 47-A-1.

(The exhibit referred to was marked Exhibit 47-A-1, and received in evidence.)

Q. (By Mr. Corinblit): I want to call your attention to the fact that, and ask you to confirm this, that for the period, for the season—these seem to be all in 1950—they are the same 901 group, approximately 23 pictures.

With the exception of two flat rentals, every picture is played on the 20 to 40 sliding scale at the United Artists Theatre, is that correct?

Mr. Johnston: You mean that is what the record shows. Is that what you are asking the witness?

Mr. Corinblit: Yes.

Mr. Johnston: Can't you read it as well as the witness?

(Testimony of Edwin F. Zabel.)

Mr. Corinblit: The court asked we have the witness verify the fact.

The Witness: That is what the record shows.

Q. (By Mr. Corinblit): And with respect to the 681 group, amounting to approximately 28 pictures for the '49-'50 season, with the exception of two pictures for \$600, all of the pictures are 20 to 40 per cent sliding scale, is that correct? [315]

A. That is what the record says.

Q. With respect to the 621 group, with the exception of two pictures, all of them are 20 to 40 sliding scale? I might point out there are a few—there is a 50 per cent provision over.

A. It looks like there are about four pictures with 50 per cent over.

Q. Other than that my statement is correct?

A. 20-40 per cent, yes, but some flat rentals.

Q. Of the flat rentals, there are two flat rentals—three of them and all of them at \$600.

Finally, with respect to group 101 to 136 they are 20 to 40 sliding scale with the exception of four which are flat rentals at \$600, and with the exception of one picture or maybe another picture in which the flat rentals—in which the sliding scale was changed to 25 per cent to 40 per cent instead of 20?

A. I think there are some in here that say 20 to 40—

Q. With the exception of one or two which say 25 to 40 and 50 per cent over, the terms are the same—20 to 40?

(Testimony of Edwin F. Zabel.)

Mr. Johnston: I didn't hear the remark of counsel.

Mr. Corinblit: With the exception of one or two which say 25 to 40 and 50 per cent over, the terms are the same—20 to 40.

The Witness: That says 25 to 40, and this one says 25 [316] to 40 and then there is 50-50 less second features.

Q. (By Mr. Corinblit): All right. Now, Mr. Zabel, in the light of these documents, isn't it a fact that you agreed with Universal on behalf of Fox, that you were to get all of their pictures for a long period of time and that the terms were 20 to 40 sliding scale. Isn't that what the agreement was?

A. No, that I don't think is the agreement. Mr. Scully asked for these theatres. He wanted to play his pictures in them and they were put on a sliding scale so they would find their own place as to what they were worth in each theatre and each theatre the sliding scale was set up, based on a basic figure, generally computed from the expense figures and that is how the sliding scale came up.

These sliding scales were changed most every year.

Now, I don't know whether Universal sold other people on a sliding scale. Apparently they did.

I know other companies did sell other customers on the same type of scale.

Mr. Corinblit: I move to strike that portion of the answer.

(Testimony of Edwin F. Zabel.)

The Witness: So we negotiated and bought each picture separately.

The Court: It may go out. But in Los Angeles Universal didn't sell any other customer first run, did they? They [317] sold—may have sold customers outside of Los Angeles first run, but in Los Angeles they did not.

The Witness: I think they sold during this period—I believe they sold most of their pictures to us. I would have to check it.

The Court: I thought you said a little while ago you got them all.

The Witness: Well, I think we did, your Honor. I don't know for sure. I didn't see a record.

Mr. Mitchell: Your Honor, he asked what the arrangement was and Mr. Zabel was explaining the arrangement. Do you want to deprive him of answering the question?

He doesn't have to accept Mr. Corinblit's arrangement. He is trying to explain what the arrangement was with Universal and now you have stricken what he said the arrangement was.

The Court: No, I haven't.

Mr. Mitchell: You said something about "It may go out."

Mr. Corinblit: What that referred to, your Honor, was a statement that other theatres—

The Court: He was talking about other theatres. I assumed he was talking about other theatres outside of the Los Angeles area.

Mr. Mitchell: That is what you had in mind?

(Testimony of Edwin F. Zabel.)

The Court: That is all. [318]

Mr. Corinblit: That is all I asked for.

The Court: We have broken the trend of thought here.

I want this witness to tell us how this 20 to 40 per cent sliding scale worked and what is meant by 50 per cent over.

This jury has never heard these terms before.

Mr. Corinblit: Yes, I think that would be a good idea.

Let us see if we can set it up in a simple way, Mr. Zabel.

If you will pardon my back, I am left-handed.

This 20 to 40 per cent sliding scale in a simple way, if you were looking at it, would read something like this, wouldn't it.

Up to X dollars 20 per cent.

Now, this X dollars is gross. Then from that figure up to another figure, 21 per cent; from that figure up to another figure, 22 per cent; from that figure up to another figure 23 per cent; and then when you got all the way down to 40 per cent here, the agreement would be that gross receipts over this figure would be shared 50-50. Isn't that a simple way of explaining it?

The Witness: It is not quite correct. [319]

Q. All right. You correct me where I was incorrect.

A. That the gross figure, in certain gross figures, it would be 20 per cent.

Q. All right.



(Testimony of Edwin F. Zabel.)

A. But if it hit a higher gross figure, then it would be 21 per cent back to the first dollar. In other words, 21 per cent of the gross and then up to 40 per cent. If the 40 per cent figure was reached, they would get 40 per cent of the gross back to the first dollar and it would be 50 per cent over that 40 per cent figure.

Q. Then to restate that for the jury, Mr. Zabel—

A. The minimum that the film company could get would be 20 per cent. If the gross went up to the— say it was \$100, just for an example, the 20 per cent figure, say 23 per cent figure—make it easier—it is \$230. Then they would get 23 per cent at 230 from the first dollar. If you grossed 230, they would get 23 per cent of the 230.

If the 40 per cent figure, say, was \$400, then they would get 40 per cent of the gross if the gross grossed \$400.

Now, I perhaps better explain how we compute this. We divide the week up into 10/10ths. There are seven days, but we divide it up into 10/10ths for the week, because your gross on Sunday, we always compute as being 3/10ths, and on Saturday 2/10ths, and each other day of the week 1/10th, which totals 10. so if they played a picture Thursday, Friday and [320] Saturday, that would be 4/10ths, so if that picture on those three days grossed \$400, the film company would get 40 per cent of that gross. In other words, 4/10ths would be \$1,600, and they would get 40 per cent of the \$1600 for film rental.

(Testimony of Edwin F. Zabel.)

If it went over the 40 per cent figure, then they would get 50 per cent of every dollar in excess of \$1,600.

Q. Now, Mr. Zabel——

The Court: Just a minute. Then I understand in the sliding scale schedule, the maximum that the distributor would get would be 40 per cent.

The Witness: No. He would get 50 per cent of everything in excess of the 40 per cent figure.

The Court: The maximum he could get then would be 50 per cent.

The Witness: No, he wouldn't get 50 per cent total. He would get 40 per cent up to the 40 per cent figure, and 50 per cent of everything over that.

Mr. Mitchell: There is one other thing that I think should be made clear. There is a variable which has to be negotiated for either picture by picture or year by year or on some other time. There is a variable on that blank line there.

The Witness: Yes, that is true. You start with a basic figure generally computed—well, it isn't necessarily [321] the expense figure. It takes into consideration an estimated cost in that figure and then you apply a formula which gives the theatre a percentage of profit at each increment.

At 22 per cent they get a certain profit. At 23 per cent they get a little more, on up to 40 per cent. This figure is negotiated and, therefore, each increment could be different on each picture. Some pictures we had a 25 per cent minimum instead of a 20 per cent minimum.

(Testimony of Edwin F. Zabel.)

The Court: What do you mean by 50 per cent over? What do you mean by that?

The Witness: If that figure was \$400 at 40 per cent, any gross over \$400 was split 50-50, 50 per cent to the theatre and 50 per cent to the distributor.

The Court: Is that what you mean by 50 per cent over?

The Witness: Yes.

Q. (By Mr. Corinblit): This figure, 20 to 40 per cent sliding scale, Mr. Zabel, as indicated by the contracts I read to you, was fixed, wasn't it, with rare exceptions, on all Universal pictures? Virtually every single Universal picture in those Fox houses, with the rarest exception, was fixed at a 20 to 40 per cent sliding scale, isn't that right?

A. I think that scale was 20 to 40 per cent from what I saw in the paper here.

Q. The figure that you say was negotiated from time to [322] time is the figure on this side of the ledger, isn't that right?

A. Yes, the basic figure.

Q. That basic figure is a figure which reflects the house expense and some other variables, isn't that right?

A. Yes, generally a negotiated figure.

Q. And it is not changed as far as the value of the picture is concerned? It has nothing to do with that, has it?

A. No.

The Court: Mr. Corinblit, I notice it is nearly 11:00 o'clock.

(Testimony of Edwin F. Zabel.)

Mr. Corinblit: All right.

The Court: Maybe we better take our morning recess now.

Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone and you are not to allow anyone to discuss it with you, you are not to express any opinion and you are not to formulate any opinion until this case has been finally submitted to you.

With that admonition, we will now recess until 15 minutes after 11:00.

(Recess.)

The Court: Is it stipulated the jury is present in the box?

Mr. Corinblit: So stipulated. [323]

Mr. Johnston: So stipulated.

The Court: You may proceed.

Q. (By Mr. Corinblit): Just a few more questions, Mr. Zabel, about this matter here. This part of the formula, I think you testified this 20 to 40 was fixed, and I wanted to talk about the other part of the formula. I think you have testified that that part of the formula was not affected by the value of the picture. What it was affected by was something like the expense of the house. In other words, if at the beginning of the year No. 1 the expense of the Ritz Theatre was so many dollars, and if some time during the period the expense of the Ritz went up, or this other figure in there, not expense, but some other figure went up, then you would negotiate that



(Testimony of Edwin F. Zabel.)

with the film companies and a new figure would be arrived at, is that right?

A. Yes. It could go up or down.

Q. Up or down. If the expense of the Ritz Theatre went down, a new figure would be arrived at, is that right?

A. They may add a matinee or something like that. That could cause the figure to be changed.

Q. But would it have to be a pretty important change in the expense figure before you would make a change?

A. I would say yes. If there was only a few dollars difference, there wouldn't be a change made, but it was changed periodically, and also at times if there was something [324] that created an additional expense, generally a matinee, where there hadn't been matinees played before, or something like that.

Q. In other words, if the wages in the theatre went up, you would make an adjustment in the scale, or if the wages went down, you would make an adjustment.

A. Yes.

Q. If some expenses in the theatre went up, you would make an adjustment, or if they went down?

A. Yes.

Mr. Corinblit: I have no further questions. Well, I beg your pardon. There is one other line of questions.

Q. Mr. Pirosh was in immediate charge of what theatres, or what group of theatres, as far as han-



(Testimony of Edwin F. Zabel.)

dling the purchasing of pictures was concerned in 1949?

A. I believe in 1949 Mr. Pirosh was in charge of bidding situations.

Q. Also, as far as having authority to discuss the purchasing of pictures with the film companies and with perhaps other theatre owners, he had that authority under you, didn't he?

A. He had the right to buy the pictures, full authority to buy pictures, negotiate for the deals and licensing of pictures with the distributors.

Q. And if, for example, someone from the United Artists [325] Theatres Circuit, Inc., came in to discuss with him the general policy as between those theatres and Fox, he had the authority to work that out, didn't he?

A. I don't know whether he had that or not.

Q. But if he did it, he had the authority to do it? I am not asking you whether he did it.

A. He had authority to go ahead and buy pictures and set the terms.

Q. My question is, if there would be a discussion between him and the United Artists Theatre Circuit about matters of policy with respect to pictures, he had the authority to make that decision?

A. What kind of matters?

Q. Well, for example, he had the authority to agree with United Artists Circuit, Inc., that he would not try to prevent them from getting Loew's pictures first run or Loew's pictures on any run?

(Testimony of Edwin F. Zabel.)

A. No, I don't think he had authority to do that. I don't know whether he would do it or not.

Q. You don't know whether he would do it or not?

A. No. Nobody gave him authority to do anything like that.

Q. But he did have authority to discuss the matter, I take it?

A. Oh, he can discuss anything he wants, as far as I [326] know.

Q. And he was in charge of—well, I will withdraw that.

Mr. Corinblit: I have no further questions of Mr. Zabel at this time.

#### Cross Examination

Q. (By Mr. Johnston): Now, Mr. Zabel, referring to this so-called sliding scale, it is true, is it not, that the actual dollars paid to Universal from the exhibition of pictures on a sliding scale would vary with respect to the picture and with respect to the gross that it did in a particular theatre, isn't that correct? A. Yes.

Q. Now, with respect to this sliding scale, at the time you negotiated for Universal pictures—I am referring to the years 1950 and 1951—did you negotiate with Universal as to each picture, as to whether it would be licensed on a sliding scale or on some other form or terms of license agreement?

A. Yes.

Q. Now, yesterday, Mr. Corinblit asked you

(Testimony of Edwin F. Zabel.)

some questions about the Fanchon & Marco case and showed you a part of the transcript in that case. When was that case tried, to [327] your knowledge, Mr. Zabel? A. I believe in 1951.

Q. When was the decision of Judge Yankwich and the findings of Judge Yankwich made in that case, Mr. Zabel?

Mr. Corinblit: I object to that.

The Witness: 1951.

Mr. Corinblit: Just a minute. I object.

The Court: Overruled. I don't know what the purpose is, but I can't rule whether it is material or not.

Mr. Corinblit: All right.

Q. (By Mr. Johnston): Now, in 1951, Mr. Zabel, you had occasion to and you did look at the opinion and the findings in that case of Fanchon & Marco vs. Paramount Pictures, did you not?

A. Yes, sir.

Mr. Corinblit: I object to that and move to strike the answer.

The Court: Overruled. He has testified he looked at it. I don't know what for, but he looked at it.

Q. (By Mr. Johnston): And included among the findings you looked at is one I am going to show you now, which is Finding 11-E.

The Court: Just read it to yourself and don't answer the next question, because I anticipate an objection.

Q. (By Mr. Johnston): It starts at page 183.

A. Yes.

(Testimony of Edwin F. Zabel.)

Q. Now, Mr. Zabel, calling your attention to the year 1951, you have testified in response to a question by Mr. Corinblit that the Universal pictures were licensed in certain Fox theatres all through that year, and I believe you named those theatres, if I remember correctly, to be the Iris, the Guild, and later the Vogue on Hollywood Boulevard, the Studio in Studio City, the Ritz on Wilshire Boulevard, and the Culver in Culver City, is that not correct? A. Yes.

Q. Now, with regard to the manner in which you licensed, or I should say played the Universal pictures in those theatres in 1951, was it your intent in doing so to do what Judge Yankwich said was reasonable to do in the Fanchon & Marco case?

Mr. Corinblit: I object to that, your Honor.

The Court: Sustained.

Mr. Johnston: What is the ground of the objection, Mr. Corinblit?

Mr. Corinblit: The ground of the objection is that it calls for a conclusion of the witness, that it is immaterial, irrelevant, prejudicial, and will lead to prejudicial evidence, and it has no bearing whatsoever on this case. [329]

Mr. Johnston: May I be heard on that, your Honor?

The Court: Referring to a finding made by another court in another case?

Mr. Johnston: I haven't sought to do that yet, your Honor.

The Court: But you are asking this witness if he

(Testimony of Edwin F. Zabel.)

relied upon that finding and if he says "yes" the question is what finding was he relying upon.

Mr. Johnston: If there is a lack of foundation I will be glad to put the finding in as evidence.

The Court: No, I don't think you can put a finding in, can you?

Mr. Johnston: I think I can, your Honor, and it goes to this issue.

Mr. Corinblit has raised the point that it was the intent of Fox West Coast to restrain competition and to monopolize the exhibition of motion pictures.

Now, if the reason why they pursued, and I am speaking of Fox West Coast, a certain course of playing motion pictures was because Judge Yankwich told them they could do so, I think then that intent and state of mind is very material in this case.

The Court: Let me look at the finding.

Mr. Johnston: Certainly. It starts at the check mark, your Honor, on page 183. [330]

(Handing document to the court.)

The Court: When was this finding made?

Mr. Johnston: The findings are dated, I think, November 7. I am not sure of the date but I think November 7, 1951, your Honor.

Mr. Corinblit: Your Honor, the damage period here ends September 1951.

The Court: Well, how could this finding affect this case?

Mr. Johnston: It can in this respect: Mr. Corinblit, and I assume that was the purpose of his testi-



(Testimony of Edwin F. Zabel.)

mony, sought to impugn the motives and intent of Fox West Coast in exhibiting Universal pictures in the way it did all through the year 1951. In yesterday's examination of Mr. Zabel he did not limit himself to that.

The Court: Your question was, Mr. Johnston, did he try to follow the directions as made in the findings.

The findings were made after the damage period.

Mr. Johnston: That may be true, your Honor. I am not talking about that. I will come to that in a moment.

I am talking about Mr. Corinblit's question put to this witness yesterday which were not restricted to 1951. They were not restricted to the period ending September 1951.

His question was directed to the entire year of 1951. And I might say too, further in this case, your Honor, that [331] you will note from an examination of the pleadings that a supplemental complaint was filed in this matter in January 1952 and I submit timewise——

The Court: Supplemental complaint?

Mr. Johnston: Yes, a supplemental complaint.

The Court: I thought we had an amended complaint.

Mr. Corinblit: Yes, we did. It was an amended complaint.

Mr. Johnston: It may have been an amended complaint or a supplemental complaint.

(Testimony of Edwin F. Zabel.)

The Court: I thought we were trying the case on an amended complaint.

Mr. Johnston: Then let us call it amended or supplemental, but in any event that pleading was filed in January of 1952.

The Court: It didn't extend the period of damage.

Mr. Johnston: That may very well be true.

The Court: Now, Mr. Johnston, just a moment. My understanding of the question was, Mr. Johnston, and maybe you had better rephrase the question—my understanding was whether or not this witness had relied upon this finding.

Mr. Johnston: That is correct.

The Court: Then I will sustain the objection.

Mr. Johnston: May I make an offer of proof?

The Court: Well, if you are going to make an offer of proof I don't think it should be done in the presence of the [332] jury.

Mr. Johnston: That is satisfactory. I will make it in any way the court desires.

The Court: Well, can you hold your offer of proof for about 30 minutes?

Mr. Johnston: I will be glad to if I don't waive any rights in so doing.

The Court: You won't waive any rights. You just hold your offer of proof until the noon recess and after we excuse the jury we will let you make your offer of proof.

Mr. Johnston: Thank you, sir. I have no further questions at this time.

(Testimony of Edwin F. Zabel.)

Cross Examination

Q. (By Mr. Mitchell): Mr. Zabel, when you and Mr. Scully——

The Court: Will you use the lectern, please? It is pretty hard to look across this way.

Mr. Mitchell: Certainly.

Q. (By Mr. Mitchell): When you and Mr. Scully had your discussion in 1946 and Mr. Scully asked you if you would make some theatres available for the playing of Universal pictures, did he ask you to make those theatres available for any length of time?     A. No. [333]

Q. Did you ask him to furnish Universal pictures to such theatres as you might make available for any length of time?     A. No.

Q. Or was any such arrangement made at a later date?     A. No, there was not.

Q. So that any time Mr. Scully or Universal wanted to stop furnishing pictures to your theatre or any time you wanted to stop licensing Universal pictures in your theatre, there was nothing in your arrangement with Scully that prevented that?

A. No, sir.

Q. Now, with respect to the operation of this sliding scale. A picture called *Sword of the Desert* played in the Ritz Theatre, is that right?

A. Yes.

Q. On this so-called 40-20 sliding scale?

A. Yes.

Q. And what film rental did you receive?

(Testimony of Edwin F. Zabel.)

A. We paid 34 per cent or \$3483.

Q. All right. Now, that same picture *Sword of the Desert*, played in the United Artists Theatre downtown on the same 40-20 sliding scale and according to this record what film rental was paid by the United Artists Theatre?

A. 34 per cent or \$4677. [334]

Q. So with this 20-40 sliding scale it resulted in varying film rentals? A. Yes.

Q. Now, take another picture in the Ritz, take *One Step*, which played during this same period of time.

The Ritz Theatre played that on a 40-20 basis and what film rental did it pay?

A. 20 per cent—\$772.67.

Q. So that the sliding scale of 40-20 per cent results in still a different film rental?

A. Yes.

Q. And you say the determination as to whether this sliding scale would be used or some other increment would be used, or whether no sliding scale would be used, was determined for each picture for each theatre? A. Yes, sir.

Q. That is all. [335]

\* \* \* \* \*

Mr. Corinblit: I will call Mr. Bertero.

**JOHN B. BERTERO**

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: John B. Bertero, B-e-r-t-e-r-o.

Direct Examination

Q. (By Mr. Corinblit): By whom are you employed?

A. I am the president of Fox West Coast Theatres Corporation.

Q. How long have you had that position?

A. Since November 1954.

Q. You are also an attorney-at-law?

A. I am.

Q. How long have you been employed by Fox West Coast Theatres Corporation?

A. Since its incorporation in 1933.

Q. Are you also an officer of the corporation known as National Theatres, Inc.?

A. Yes. That company owns all the stock of Fox West Coast Theatres Corporation. I am a vice president and counsel [341] for National Theatres, Inc.

Q. National Theatres, Inc., is the successor, is it, to National Theatres Corporation, the defendant in this case?

A. National Theatres, Inc., acquired indirectly all the shares—I think it was directly—shares of



(Testimony of John B. Bertero.)

National Theatres Corporation—is that the name of the defendant?

Q. Yes.

A. In September of 1952, and indirectly acquired all the assets formerly owned by National Theatres Corporation.

Q. Prior to National Theatres Corporation transferring or causing its assets or stock to go to the new corporation, National Theatres, Inc., is that a correct statement? Prior to that time were you an officer of National Theatres Corporation, the defendant in this case?

A. I became an officer of National Theatres Corporation in September of 1952, and I remained an officer, vice president of the company, and its counsel, until the dissolution of the National Theatres Corporation in September 1953.

Q. How long were you employed by the defendant National Theatres Corporation?

A. I was a vice president and counsel for the company for approximately one year from September of 1952 to September 1953, when it was dissolved.

Q. For what period of time had you been performing services for National Theatres Corporation? [342]

A. During the period, oh, from about 1930 until the dissolution of the company, I sporadically on occasions performed services.

Q. With respect to the defendant Fox West Coast Theatres Corporation—

(Testimony of John B. Bertero.)

A. These were legal services. I acted as attorney for the company, I might explain that, during the period.

Q. For National Theatres Corporation?

A. Yes, on a number of occasions throughout a period of about, let's see, 20 odd years, I undertook legal matters for the company.

Q. As far as Fox West Coast Theatres Corporation, the defendant, what services have you performed for Fox West Coast Theatres Corporation since you were employed by them?

A. I became assistant secretary of the company in 1933, and mainly engaged in legal activities for four or five years. Then got involved in financial and real estate matters, corporate matters. Became a vice president of the company in 1942, June 1942. I continued in that capacity until I became the president of the company in November 1954.

Q. In connection with your duties, you had occasion to consult with the buyers and operators of the Fox West Coast Theatres in this area about the matter of runs and clearances, isn't that right?

A. Yes. [343]

Q. You were aware of any contractual arrangements between Fox and the suppliers of film with respect to the availability of pictures for the Los Angeles area, is that right?

A. Throughout the years, I was generally familiar with them, but in late years—it was very difficult to bear that in mind, and so I have lost track of them since about 1947 and 1948.

(Testimony of John B. Bertero.)

Q. You were certainly directly aware of and directly responsible for relationships between Fox and other theatre owners in the L. A. area insofar as they were joint interests between you and other theatre owners.

A. You will have to explain that to me, what you mean. I don't know.

Q. If, for example, Fox West Coast and United Artists Theatres Circuit had a joint interest in some theatres, you knew all about that?

A. Well, that is giving me a lot of credit. In reference to the matter you speak of, we had a corporation in which we owned 70 per cent of the shares, Fox West Coast Theatre Corporation owned 70 per cent, and a company known as United Artists Theatres of California, Ltd., which I understood to be a subsidiary of United Artists Theatres Circuit, owned 30 per cent of the shares, and obviously I was somewhat familiar with the workings of that corporation. In my day-to-day routine affairs I had to learn quite a bit about it, but I [344] can't say I knew all about it or carried it all in mind.

Q. In 1949, what were the theatre interests that you, Fox West Coast, and this corporation you have named, United Artists Theatres, had jointly in 1949, beginning early, in January 1949?

A. What do you mean what were the theatre interests? You want me to name all the theatres?

Q. No. How many theatres were there jointly owned?

A. Now, wait a minute. Let's don't talk about

(Testimony of John B. Bertero.)

jointly owned. I tried to explain. United West Coast Theatres Corporation operated a group of theatres. 70 per cent of the shares of that company were owned by Fox West Coast Theatres Corporation, and 30 per cent by United Artists Theatres of California, Ltd. That corporation operated a group of theatres extending throughout the state of California. My present recollection is that at one time, I think in 1949, they totalled about 55 theatres operated throughout the state.

Q. I wonder if we could just quickly locate some of these theatres in this area so that the jury will understand what we are talking about. Looking first at the Hollywood area, what theatres did that company own—that is, in what theatre on Hollywood Boulevard did you and the United Artists Theatres Circuit have a joint interest through this corporation?

A. Mr. Corinblit, you keep using the words joint interest [345] in an invidious sense, and I am trying to convey to the jury the exact fact. Let's talk about the operation of United West Coast Theatre Corporation and I think we will keep on common ground, at least when I say we operated, I mean that company operated.

On Hollywood Boulevard, the United West Coast Theatres Corporation operated the Egyptian Theatre.

Q. And in down town Los Angeles, were there any theatres?

(Testimony of John B. Bertero.)

A. In 1949, according to my recollection, it operated no theatre.

Q. Now, in the Wilshire area?

A. It operated the Four Star Theatre on Wilshire Boulevard.

Q. The Four Star. Next?

A. Wait a minute. Until the end of 1949 it had a stock interest in a theatre known as the El Rey on Wilshire Boulevard.

Q. All right. In the area between Wilshire and Hollywood Boulevard, what other theatre? Were there any other theatres in the group?

A. Could I come down to the map?

Q. Surely.

(Witness leaving stand.)

A. If you will delineate the area, I will pick out the [346] theatres which it operated.

Q. Yes, sir. I have lost the pointer. You might stand on this side, Mr. Bertero. I will give you a pencil, if you want to use that.

A. I want you to delineate the area you are speaking of.

Q. Yes. I want to stand back here so the jury can watch you. In the area between Wilshire Boulevard and Hollywood Boulevard in Los Angeles, will you designate the theatres, if any.

A. What length on Wilshire Boulevard? Give me a square or rectangle, if you have in mind some area.

Q. In this area from Wilshire Boulevard run-



(Testimony of John B. Bertero.)

ning from Beverly Hills to downtown up to Hollywood Boulevard, what were the theatres, if any?

A. I mentioned the El Rey already. I mentioned the Four Star on Wilshire Boulevard. It had an interest in the Fairfax Theatre over on Beverly Boulevard. My present recollection is it had no other theatres in the area.

Q. Now, in the Inglewood area, would you designate the theatres that were operated by this corporation that you described?

A. Until December 1949, it operated the Fox—I may be in error on that. I think there was a period of about a year when it didn't have an interest in the Fox and that may have [347] been 1949. I am not certain. The Academy, the United Artists and the Inglewood Theatre.

Q. Would you point those theatres out?

A. It is difficult to point them out. It would be pointless.

Q. Point the Academy out. It is not in the group there. It is out here, isn't it?

A. The Academy and Inglewood, Fox, United Artists. These are in downtown Inglewood, and the Academy is, as I remember, about a mile and a half or two miles from downtown Inglewood.

Q. The Academy in 1949 you would describe as a 7 day house, isn't that right, generally licensed on 7 day availability?

A. I think that is right, but I am not sure.

Q. What other 7 day houses did you have in 1949 operated by the same company?

(Testimony of John B. Bertero.)

A. What is the area you are speaking of? I can take a large area or a small area.

Q. What I have reference to is the entire map, but I can go through them one by one. What did you have with respect to the Pasadena area?

Mr. Mitchell: Object as immaterial.

The Court: What difference does it make? They have stipulated they owned a large number of theatres. [348]

Mr. Corinblit: Yes, your Honor. The only purpose was to delineate in that area indicated on the map those theatres being jointly operated by this company, because there are arrangements that were made subsequently that related to those. I think it will take only a moment, if your Honor feels we can carry it through. [349]

The Court: Overruled.

The Witness: In the Pasadena area, to which Mr. Corinblit referred, the distributors customarily licensed a 7-day availability and our competitor, the Crown Theatre was licensed 14 days on certain pictures, and the Academy licensed—

Mr. Mitchell: Is this question directed to Fox West Coast for United Artists?

Mr. Corinblit: United West Coast in which they had an interest. I am going to move to strike the answer of Mr. Bertero to the last question.

The Court: I think it had better go out along with the question. I don't think the reporter got the question so we will start all over.

Q. (By Mr. Corinblit: What were the theatres

(Testimony of John B. Bertero.)

of the United *States* West Coast Theatres — what were the theatres operated by the United West Coast Theatres in Pasadena?

A. It operated the Academy Theatre.

Q. Yes, the Academy.

A. I believe also the Strand.

Q. The Strand. And what else?

A. I think the Pasadena was closed at that time, but it may have been operating. At least there was a lease on the theater. Whether it was closed or operating, I don't know. [350]

Q. All right, is that all?

A. And the State Theatre in Pasadena.

Q. All right. Now, what theatres did they have in other areas including the Glendale area?

A. United West Coast Theatres Corporation operated the Capitol Theatre in Glendale and the California Glendale.

Q. Yes.

A. The name of the California may have been changed. I don't recall.

Q. And it also operated in some theatres in the Belvedere Gardens area?

A. It operated one theatre in Belvedere Gardens, namely, United Artists and it had an interest in a theatre called the Golden Gate.

Q. It also may have had the Royale?

A. Yes. It may also have operated the Royale, if it appears on the map. It may have been closed at the time because of business condition.

Q. All right. Now, finally—I don't know that

(Testimony of John B. Bertero.)

this is final, but you had some interest in theatres at Long Beach?

A. United West Coast Theatres Corporation operated possibly five theatres in Long Beach.

Q. Would you name them?

A. The West Coast, the Imperial, the Egyptian, the [351] United Artists.

Those are the principal theatres. And also the Long Beach Theatre. It had an interest in the Long Beach Theatre in Long Beach.

Q. Now, unless you can't recall we have just—we have enumerated substantially all of the theatres that would be indicated on this map which were operated by United West Coast?

A. That is a memory test. I think so, Mr. Corinblit.

Q. Now, in 1949 the Fox West Coast and National Theatre Corporation were negotiating a termination of the joint—well, I will withdraw that question.

They were negotiating leading to the termination of the interests that United Artists Theatre Circuits had in United West Coast Theatres Corporation, is that correct?

A. Well, in 1949 we, as the owners of 70 per cent of the stock and we, meaning West Coast Theatres Corporation, negotiated with the owners of the other 30 per cent to terminate our respective interests on some basis, and exchange in effect stock for theatres.

Q. When did those negotiations begin?



(Testimony of John B. Bertero.)

A. About, I would say, the spring of 1948 they first became serious and the negotiations extended from about the spring of 1948 until the parties came to an agreement.

Q. And when was that? [352]

A. Oh, I think the papers were signed probably in about the fall of 1949.

Q. Now, were all of the interests—did the interests of that corporation in some theatre last any longer than November of '49?

A. Well, this was a rather large business deal and one of the big problems in it was we wanted to acquire full ownership of the Chinese Theatre, which is a very important theatre, and as I remember, if you are asking about the termination date of it, we signed the papers probably in, I believe in about November of 1949. But obviously with so many legal complexities and business complexities, I think we provided for a termination date on January 1, 1950.

There was an exchange of theatres. We acquired the Chinese and we traded in several of our theatres that we owned up north, and there might have been a spill-over period in adjusting to the accounts, but as I recall the accounts provided for a break-off date of January 1st of 1950.

Q. After January 1, 1950, you didn't operate any theatre in which United Artists Theatre Circuit had an interest?

A. Well, generally the answer is no. As I say there might have been a spill-over date.



(Testimony of John B. Bertero.)

Yesterday I learned that the escrow on the deal— [353] we handled it through the title company because of the importance of the matter, that the closing at the title company where deeds were exchanged and leases terminated and cash paid back and forth, that that was on January 16th.

Now, it is conceivable that the company operated for a few days longer or maybe a month or two longer but the final adjustments as I recall were to be made retroactive to January 1st of 1950.

Q. How long in 1950 did you continue to operate?

A. I don't think probably more than two weeks or four weeks—whatever it took to conclude this transaction.

Mr. Corinblit: Your Honor, I notice it is 12:00 o'clock.

The Court: Ladies and gentlemen of the jury, you are about to be excused and again it is my duty to admonish you that you are not to discuss this case with anyone. You are not to permit anyone to discuss it with you and you are not to formulate or express any opinion as to the rights of the parties in this trial until the case has been finally submitted to you. With that admonition you will be excused until 2:00 o'clock this afternoon. Will you kindly retire quietly as the court is still in session.

(The following proceedings were had in the absence of the jury):

The Court: Now, Mr. Johnston, you may make your offer of proof. [354]

Mr. Johnston: I seem to have misplaced the finding.

The Court: I have it.

Mr. Johnston: Oh, I beg your pardon. Thank you, sir.

Your Honor, at this time I make an offer of proof.

I offer to prove through the testimony of the witness Zabel, that it was the intent of the defendant Fox West Coast in 1951, in the playing of pictures, playing of Universal pictures in these theatres, the Iris, Guild, Vogue, Culver City, Studio and other theatres that he may have described as playing Universal pictures, it was the intent of Fox West Coast to do what Judge Yankwich said was reasonable to do in the case of Fanchon & Marco versus Paramount Pictures, et al, pursuant to finding 11(e) in that case, which I shall now read into the record: [355]

“Universal generally follows the practice of licensing the Los Angeles area first run exhibition of its pictures to theatres in the downtown Los Angeles, Hollywood and Wilshire districts and in Culver City and the Universal City section of the San Fernando Valley. Universal usually limits such first run exhibition of its pictures to the United Artists Theatre in the downtown Los Angeles district, the Iris and Guild Theatres and the Vogue Theatre in the Hollywood district, the Ritz Theatre in the Wilshire district, the Culver Theatre in Culver City, and the Studio City Theatre in the Uni-

versal City section of the San Fernando Valley. All such action by Universal is reasonable.”

I make this offer, your Honor, to negate the assertion by plaintiff in this action that the intent of Fox in so playing Universal pictures was to restrain competition and to exercise a monopoly of exhibition.

That completes my offer, your Honor.

The Court: Mr. Johnston, according to the transcript that is dated November 1, 1951.

Mr. Johnston: I think November 7.

The Court: Now, how could this witness say that he intended to follow that admonition or directive in September of 1950 and the first part of 1951, when it wasn't even in [356] existence?

Mr. Johnston: That may be true, your Honor. I shall come to that in a moment. But let me say what I perhaps ineffectively said when the jury was here.

Mr. Corinblit introduced evidence yesterday of the exhibition of Universal product in certain theatres not confined to the period ending September, 1951, but throughout the whole year, and questioned Mr. Zabel extensively on that.

He also put in an exhibit which didn't cover the period ending September, 1951 but going completely to the end of the year with respect to the exhibition of Universal pictures.

The Court: Mr. Johnston, your question is, “Did you intend to rely on this?” or “Did you try to rely on it?” when it wasn't even in existence. That is my objection.

Mr. Johnston: I understand the court's position. I think the court, perhaps, doesn't understand my position.

I am speaking—at the moment I am talking about an assertion which was made here that the exhibition of Universal pictures in certain Fox theatres throughout the year 1951—that evidence has gone in. And through that I believe it is plaintiff's position that the intent throughout the year was to restrain competition and to exercise monopoly power.

The Court: Well, I am going to instruct the jury at the proper time that they are only concerned with the period from September '50 to September, '51. They are not to consider any [357] damage that occurred after September, 1951.

Mr. Johnston: I might say further, your Honor, that I can offer, and I do offer to prove by this witness, Mr. Zabel, that evidence of the exhibition of Universal product in Fox theatres was given in the Fanchon and Marco case, the same evidence that has been, of course—it is essentially the same evidence that has been given in this action.

The judge in that case rendered his decision in August of 1951 in favor of the defendant Fox West Coast, and in fact in favor of all the defendants.

The Court: Well, I don't think there is a judgment until it has been written and signed and filed by the court. He might change his mind from the time he tried the case until the time he signed the judgment.

Mr. Johnston: That could be, conceivably, legal-

istically true, your Honor, but if a court renders a comprehensive opinion, certainly if people who were parties to that action guide themselves by that opinion, and their intent to perform or do certain things pursuant to that opinion——

The Court: Where is that opinion? Was there an opinion?

Mr. Johnston: Yes, your Honor.

The Court: What was the date of the opinion?

Mr. Johnston: August 7, I believe, 1951. I will give that to you in just a moment. It was sometime in August— [358] August 17, 1951.

The Court: Well, that was just two weeks before the end of the damage period here.

Mr. Johnston: That is true.

The Court: Then how could the witness say he tried to follow the directive of Judge Yankwich eight months before the opinion was written?

Mr. Johnston: I didn't ask him that. I asked him if he tried to follow it after the directive and the mandate. Of course he could not follow it, your Honor, in advance of his knowing what the decision would be, but he could follow it after that decision was announced.

The Court: In other words, we have two weeks here——

Mr. Johnston: I don't know the precise date.

Mr. Westbrook: I think it is exactly a month.

Mr. Johnston: A little over a month.

The Court: Well, the middle of August to September.



Mr. Westbrook: The complaint was filed September 17th.

Mr. Johnston: Roughly a month.

The Court: Mr. Corinblit, what do you want to say?

Mr. Corinblit: Your Honor, it may be against our better interests to argue against this motion, because, if Mr. Johnston wants to get in these findings of fact of Judge Yankwich, entered in 1951, I suppose we ought to be able to show that these people knew they were violating the law by [359] putting in the Paramount findings, which were entered in 1950, and putting in the decree, the final decree in 1951, for that purpose, so it may be against our better interest to argue against this point.

I want to take these up one by one.

Mr. Johnston asserted that we put in a schedule up to 1951. The assertion is incorrect because the exhibit he referred to, Exhibit 46-A-5, which exhibit ends with September 20, 1951. So that first point is incorrect.

Secondly, he refers to an opinion of Judge Yankwich. Your Honor, there is no basis that I know of, no basis under which actions referred to, taken on the basis of an opinion by Judge Yankwich, could have changed the situation.

Mr. Mitchell induced Judge Yankwich to change his opinion by writing a letter and asking him to change his opinion, the opinion which he had filed, and that is in the record of the case. It is a letter which was filed—Mr. Mitchell wrote a letter and

told Judge Yankwich that he thought there were some——

Mr. Mitchell: Clerical errors.

Mr. Corinblit: ——that there were some matters——

The Court: Well, Judge Yankwich may have changed his opinion between the time of filing and the printing of it.

Mr. Corinblit: Yes.

Mr. Mitchell: Any day I can get Judge Yankwich to change an opinion, it is a new day. Those were clerical errors. [360]

Mr. Corinblit: Even Judge Yankwich's judgment wasn't final, because the plaintiff immediately appealed therefrom. It was on appeal for a year or two thereafter, even a petition in the Supreme Court of the United States. That is not a final decision on which anyone can rely, can take a position, besides the fact that there is nothing in the world to prevent Mr. Johnston from asking, except I think there might be some technical objections, to ask Mr. Zabel, "Now, what did you do when you were operating these theatres?" I think there might be some technical objections to that, but to relate the objection to the opinion of a judge, it seems to me, is remote from the issues and certainly there is no basis for it.

Mr. Johnston: Your Honor, perhaps I was in error as to the exhibit, the time period covered by the exhibit he refers to. If I am, I tender my apology both to the court and to Mr. Corinblit.

However, with respect to the actual testimony,

the questions put by Mr. Corinblit, I am reading from page 254 of yesterday's proceedings, and without reading the preliminaries and simply paraphrasing the testimony, Mr. Corinblit was inquiring about this Universal situation, and Mr. Corinblit said at line 16 of the page I have indicated:

"Q. And that continued through 1951?"

"A. Yes. [361]"

"Q. The time you are referring to was from 1946 to 1951, a five-year period?"

"A. That is correct. I think I am getting confused now because there are some different theatres here at the time but most of the time they were these five theatres."

I simply say in support of my position that Mr. Corinblit elicited from this witness testimony during the whole year 1951.

The Court: Mr. Johnston, if we didn't have a jury here, I would let this testimony come in and I would let the findings come in, because I would take the finding you have for what it is worth. The jury might consider it in a different light.

I have sustained the objection of the defendants so far relating to the findings in the Paramount case. If I allow the findings in one case to come in, why shouldn't I allow the findings in other cases to come in?

Are you willing to let this finding come in with the understanding that I will let the Paramount findings come in at the proper time?

Mr. Johnston: I think you are putting me in a rather unfair position with a deal of that charac-

ter, your Honor. I think you know what my answer would be.

The Court: Yes, I know what your answer would be. [362]

Mr. Johnston: I do say this. Perhaps I have not effectively stated my position. It isn't the findings per se that I want in evidence. It is what the state of mind of Fox West Coast was, what was their intent? Was it their intent to do something that the court, Judge Yankwich, said they couldn't do?

The Court: Can't I take that argument and say a finding in the Paramount case shows the intent of the defendants, what they did?

Mr. Johnston: No.

The Court: I don't know.

Mr. Johnston: No, your Honor, I see no connection.

The Court: I am afraid, Mr. Johnston, you are flirting with trouble.

Mr. Johnston: Well, I simply wish to urge at this time the position I have urged.

The Court: I think the best solution of this is to sustain the objection.

Mr. Johnston: Perhaps then this will work both ways.

Mr. Mitchell: Is there an intention, Mr. Corinblit, to put in the contract with respect to the termination of the Fox West Coast interests, whatever it is?

Mr. Corinblit: I haven't decided for sure on that.

Mr. Mitchell: That is going to be troublesome to



[363] discuss that in front of the jury, because that order is just full of U. S. against Paramount. I have a position on U. S. against Paramount which I have urged, and I don't want it to come in directly and I don't want it to come in indirectly through reading excerpts out of letters or agreements or orders or any other way.

Mr. Corinblit: Your Honor, on that I am aware——

Mr. Mitchell: It is difficult to discuss in front of the jury without just saying it, and so if he is going to introduce or offer such a paper, I think it should be done outside the presence of the jury.

Mr. Corinblit: I am aware of Mr. Mitchell's position, and I am aware of the questions that you have had and the tight rules of proof you have required prior to the admissibility of any portion of the Paramount case. I will adhere to that and I will not try to make use of the fact that the jury is present to avoid what I know are the proper procedures.

The Court: I noticed a little while ago that the defendants in cross examination, I thought was getting to the place where they were going to ask the reasons why theatres were transferred. If the defendants open the door as to why they were transferred and they bring in the Paramount case, then I will have to admit the Paramount case, so don't open the door.

Mr. Mitchell: Some of these witnesses, you know—— [364]

The Court: I know, but if you deliberately ask the question why, then I may say——



Mr. Mitchell: We won't open the door.

Mr. Johnston: We are not going to open the door, your Honor.

Mr. Corinblit: Your Honor, I don't want what I have said to militate against this point. I think, without regard to what may be your overall ruling on admitting the Paramount decree, which we hope to convince you that you should do, portions of it, with respect to various elements of the case, getting down to the narrow point of the transfer of theatres, and so forth, I think there may come a time when that will be directly material to some of the issues here. I don't mean to say it will not become material, but I will certainly not use the fact that the jury is present to get it in behind the door. I will come right out and say I think it is admissible and ask you to rule on it.

The Court: Mr. Corinblit, you know my stand in regard to this matter and I am quite sure you will recognize and pay attention to it.

Mr. Corinblit: Yes, sir.

The Court: Court will now stand in recess until 2:00 o'clock.

(A recess was taken to 2:00 o'clock, p.m.)

Thursday, July 12, 1956—2:00 P.M.

The Court: Is it stipulated the jury are present and in the jury box?

Mr. Corinblit: So stipulated.

The Court: You may proceed.

Mr. Corinblit: Mr. Bertero, will you take the stand.

JOHN B. BERTERO

resumed the stand, and testified further as follows:

Direct Examination

Q. (By Mr. Corinblit): Mr. Bertero, before the recess we were discussing the theatres that were owned or operated by United West Coast Theatres Corporation in which I think you testified that Fox had—Fox West Coast owned 70 per cent of the stock and the United Theatres Circuit directly or indirectly owned 30 per cent—United Artists Theatres Circuit.     A. In 1949?

Q. Your company, Fox, and United Artists Theatres Circuit, Inc., were sharing the profits from the exhibition of Loew's pictures on first run in Hollywood, isn't that right?     A. In 1949?

Q. Yes.

A. In 1949 United West Coast Theatres Corporation operated the Egyptian Theatre until about November of that year. Then I think it was the middle of November that we ceased our interest in it, and the Loew pictures were customarily licensed and exhibited at the Egyptian Theatre on Hollywood Boulevard first run Los Angeles, that is correct.

Q. And that exhibition was simultaneous with an exhibition downtown at the Los Angeles Theatre customarily?     A. That is correct, yes.

Q. Now, in 1949 Fox, on behalf of its four theatres, was sharing with United Artists, with respect to their downtown theatre, the gross revenues on

(Testimony of John B. Bertero.)

first run to be realized from Universal pictures, isn't that right?

A. I would like the question repeated. I got lost there.

The Court: Read the question.

(Question read.)

The Witness: What four theatres are you speaking of, Mr. Corinblit?

Q. (By Mr. Corinblit): The four Fox theatres that were playing day and date with United Artists Theatre downtown. Those were the only theatres——

A. Wait a minute. Let us take them one by one, and then my memory will come back to me.

These apply to the Universal pictures?

Q. Yes.

A. Well, sitting here I remember—I recollect that Universal pictures customarily went for a period of time to two theatres on Hollywood Boulevard, the Iris, in which United West Coast had no interest whatsoever and in the Guild in which United West Coast had no interest. And then what were the other two theatres you had in mind?

Q. Culver and Ritz.

A. The Culver. United West Coast had no interest in it. That was a theatre of Fox West Coast and the Ritz, the Ritz was operated by United West Coast, so there was one instance of the four where United West Coast operated the theatre.

Q. So that with respect to the Ritz, as far as Universal pictures were concerned, the revenues

(Testimony of John B. Bertero.)

from first run was operated by United West Coast and therefore you were sharing the profits to be derived therefrom, from the United Theatre Circuit—that is as far as the Ritz was concerned?

A. The fact is United West Coast was operating the Ritz and any time it played a Universal picture, and if it showed a profit at the end of the year from the exhibition of all pictures at the Ritz Theatre, then to that extent there was profit in the United West Coast Theatres Corporation, and also to that extent United Artist Theatre Circuit through [368] a subsidiary owned a 30 per cent interest in the corporation. I think that is the fact and whatever conclusion you draw from it is your own.

Q. All right. Now, and of course I don't know if you testified, but of course it is a fact that the only other theatre that played Universal pictures first run at that time was United Artists Theatre downtown—that is played day and date with that group of theatres?

A. I can remember that Universal played its product downtown in the United Artists Theatre. We had no connection with that in 1949, none whatever.

Q. Those are the only group of theatres that had Universal pictures on first run?

A. The theatres we have mentioned, the two on Hollywood Boulevard, the Ritz, the Culver and the downtown United Artists Theatre in which we had no interest, exhibited Universal pictures first run ordinarily. [369]



(Testimony of John B. Bertero.)

Q. Now, turning back for a moment again to Loew's pictures, the sharing through United West Coast with United Artists Theatres Circuit of the profit to be derived from the exhibition of Loew's product first run in the Egyptian Theatre was by reason of a document known as the basic agreement, isn't that right, the contract between you and United Artists Theatres Circuit, Inc.?

A. If I understand what you mean, it was an agreement between Fox West Coast Theatres Corporation and United Artists Theatres of California, under which it was agreed a corporation would be formed and we would own 70 per cent of that stock and the other party 30 per cent, and we agreed to lease or sublease, as the case may be, certain of our theatres to this company, and the other party to the contract, the United Artists Theatres of California, Ltd., would lease certain theatres to that company.

Now, that company operated the Egyptian Theatre until about the middle of November, 1949, as I recall, and during that time the Egyptian Theatre, at least part of the time, was profitable, and to that extent United West Coast made a profit and the 30 per cent stockholder participated indirectly.

Q. Speaking with respect to Loew's product downtown during 1949, while Fox had the theatre—withdraw that.

Speaking with respect to the Los Angeles Theatre [370] downtown, which was the theatre downtown playing the Loew's product on first run in



(Testimony of John B. Bertero.)

1949, Fox had an interest in that theatre and also a separate interest in the profits, isn't that right?

A. I think in 1949 we owned the Los Angeles Theatre 100 per cent. I am not clear on that. It might have been a little later and it might have been a little earlier that we acquired a 100 per cent interest, but in any event we had an interest in the theatre, and we exhibited customarily until we were thrown out of the theatre—no. I beg your pardon.

We customarily exhibited the better Loew's pictures in the Los Angeles theatre downtown until at least November, 1949.

Q. I want to refresh your recollection as far as the date when you received a full interest in the theatre.

A. I will accept whatever you state. It was somewhere around 1949 or 1950. I can't recall.

Q. If I show to you an agreement with Metropolitan Theatres dated November 14, 1949, would that pin the date down?

A. It is very close to the date I had in mind. November, 1949?

Q. Yes.

A. I was pretty good on my recollection.

Q. Yes, you were. I just wanted to pin it down to the [371] part of the year.

A. Yes. We owned a very substantial interest in the Metropolitan Theatres Corporation and we enlarged our interest to 100 per cent, so we became

(Testimony of John B. Bertero.)

the full owners of the Los Angeles Theatre at that time.

Q. During the period prior to November, 1949, January to November, 1949, you had an interest in the Los Angeles Theatre indirectly through another corporation, did you not?

A. Yes. We owned the shares of the corporation, owned part of the shares.

Q. And you also had a 25 per cent interest in the profits of that theatre so long as it played Loew's product first run, isn't that right?

A. Not in 1949, according to my recollection, Mr. Corinblit. I think from about 1948 to 1949, and after that when we owned 100 per cent, I think our interest in the operation of the Los Angeles Theatre was through this subsidiary company and was solely our stock interest.

Mr. Corinblit: I will ask the clerk to mark as plaintiff's exhibit next in order an agreement, copy of a letter agreement, a copy of which we have just obtained. Although I had knowledge of its existence, I didn't have a copy. I think we ought to separate these. A letter from Fox West Coast to Metropolitan Theatres Corporation dated May 29, 1947. Make it 48-A because I have another. [372]

The Clerk: 48-A-1.

(The exhibit referred to was marked as Plaintiff's Exhibit 48-A-1 for identification.)

Mr. Corinblit: And this is 48-A-2, a letter from Fox West Coast to the Metropolitan Theatres Corporation dated May 1, 1947.

(Testimony of John B. Bertero.)

The Clerk: 48-A-2 for identification.

(The document referred to was marked as Plaintiff's Exhibit 48-A-2 for identification.)

Q. (By Mr. Corinblit): I will show you Plaintiff's Exhibit 48-A-1, Mr. Bertero, and ask you if that is your signature at the bottom of the page.

A. Yes, it is.

Q. And the same thing with respect to Exhibit 48-A-2. A. Yes, it is.

Q. Would you examine 48-A-1, please.

A. I have examined it.

Q. Thank you. You might look at 48-A-2 at the same time.

Now, Mr. Bertero, does a reading of Plaintiff's Exhibit 48-A-1 refresh your recollection as to the period during which Fox had a 25 per cent interest in the net profits of the Los Angeles Theatre so long as that theatre operated, played Loew's pictures first run in Los Angeles?

A. No. It confirms my recollection. I said we [373] enlarged our interests. We had an interest in Metropolitan and then there were certain negotiations going on between us and Metropolitan in respect to the Los Angeles Theatre, and we enlarged our interest, and so today, unfortunately, we have 100 per cent of the Los Angeles Theatre. [374]

Q. Well, my question though is, Mr. Bertero, whether it isn't true in 1947 to November, 1949 you had an agreement with Metropolitan whereby you got 25 per cent of the net profits of the Los

(Testimony of John B. Bertero.)

Angeles Theatre so long as that theatre played Loew's pictures first run.

A. The agreement speaks for itself. It is in writing there, Mr. Corinblit. I can't dispute that.

Q. All right.

A. I said we enlarged our interests.

Q. Well, will you state that it is true then that you did have such an agreement in effect between '47 and November, '49?

A. I must concede I signed it and also that the agreement was in effect as to when it was terminated. I don't know, but we had extended negotiations in regard to the Los Angeles Theatre with our own subsidiary. That is why I signed on behalf of Fox West Coast and the president of the subsidiary company or vice president signed on behalf of our subsidiary.

How long the arrangements were in effect I don't recall.

Mr. Corinblit: The plaintiff will offer in evidence Exhibit 48-A-1 and 48-A-2.

The Court: It may be received.

(The documents heretofore marked Plaintiff's Exhibits Nos. 48-A-1 and 48-A-2 for identification were received in evidence.) [375]

\* \* \* \* \*

Q. (By Mr. Corinblit): In this letter that I have just read, Mr. Bertero, you refer to a letter agreement dated June 15, 1944.

I will show you Plaintiff's Exhibit 31-H—first I will ask you whether or not—it is just a typewritten



(Testimony of John B. Bertero.)

signature, but I will ask you whether or not this is the letter agreement to which you refer in your letter of May 29, 1947.

A. Yes. I prepared this letter and signed it.

Q. You are referring to 31-H?             A. Yes.

Q. All right. And that is the letter agreement referred to in your letter of May 29, 1947?

A. If it is the date, yes, I am sure it is. [377]

Q. All right.

Mr. Corinblit: I will offer Plaintiff's Exhibit 31-H.

The Court: It may be received in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 31-H.)

Q. (By Mr. Corinblit): Now, we will come back to these letters in a minute.

The agreement pursuant to which you operated the Los Angeles Theatre—I beg your pardon, operated the Egyptian Theatre and the Ritz Theatre, as a result of which Fox had 70 per cent of the stock and this other corporation referred to in one of the letters had 30 per cent interest, was the document known as the basic agreement, isn't that correct?

A. Actually, to be precise about it, United West Coast Theatre Corporation had a sublease of the Ritz Theatre for a period of time and that corporation operated the theatre.

Q. Yes, but the agreement whereby that took place was a document known as the basic agreement?



(Testimony of John B. Bertero.)

A. It arose out of what you call the basic agreement, which was the one that provided for the setting up of the new corporation and the leasing to it of the various theatres.

Q. And it was that agreement which was the subject of negotiations between you and United Artists Theatre Circuit in 1949, the termination of this agreement? [378]

A. Well, in a way you could say then, I think, basically. We both wanted to achieve a dissolution on a mutual basis of that corporation and there was involved the negotiations toward acquiring full ownership of the Chinese Theatre and one or two other theatres. I don't recall, but in a measure you might ascribe it as our intention to break up all the relationship that we had that year.

Q. The terminating agreement in 1949 refers to the basic agreement, doesn't it?

A. I think it does but I am not sure. Let me reflect on that for a moment. It is so long ago now. Yes, I think it referred to it. I think the agreement was in effect. That probably was 1954. If there had been an extension to 1954 we would have terminated the agreement as such.

Q. I will show you a document which has been heretofore marked as Plaintiff's Exhibit 31-F and ask you if you can identify this as the basic agreement to which we have referred.

(Handing document to the witness.)

A. This is the document that you refer to as the basic agreement, if this is the one of 1934.

(Testimony of John B. Bertero.)

Q. Yes, that is the one.

A. Yes.

Q. And its period of extension would have been 1954 unless you terminated before that?

A. Let me see. This expired in 1939, I [379] think, and it was extended for 10 years to 1949 or perhaps five years. That is where I am not certain, but in any event it was in effect either on a month-to-month basis or for a short period or short term in 1949.

Q. All right.

Mr. Corinblit: Plaintiff will offer in evidence Exhibit 31-F.

The Court: It may be received in evidence.

Mr. Johnston: May I see it before the court makes a ruling?

The Court: Yes.

(Document handed to Mr. Johnston.) [380]

The Clerk: Is this in evidence? What is the number?

Mr. Corinblit: 31-F.

The Clerk: Exhibit 31-F.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 31-F.)

Q. (By Mr. Corinblit): Now, Exhibit 31-F, which we described as the basic agreement, was tied to a so-called four-theatre agreement, was it not, Mr. Bertero, that is, a theatre agreement whereby four theatres were pooled together by you and United Artists Theatres Circuit, Inc., for operating

(Testimony of John B. Bertero.)

first run, and that theatre group later played Loew's product first run, isn't that right?

A. I think that they were not tied together except in one provision. My recollection of these 1934 arrangements, contracts, is that the so-called Venture agreement was entirely separate and apart from these arrangements, but that there was a provision to the effect that if the Four Star Theatre on Wilshire Boulevard, which was then operating subsequent run, should become a first run theatre Los Angeles, then it should be included with the Chinese, the Loew's State and the downtown United Artists. So there are three theatres plus the fact that the Four Star, if it operated first run, should be included.

That is the only reference, I think, in one [381] agreement to the other.

Q. Don't you remember in that four theatre venture there is a provision that if this agreement is terminated, the theatre venture agreement will be terminated? Do you remember that?

A. Say that again.

Q. That if the basic agreement, 31-F, was terminated, the four-theatre venture agreement would be terminated.

A. You asked about the tie-in from the basic agreement over to the venture. I didn't remember any provision in the basic agreement, and I still don't remember any——

Q. Have you finished? I am sorry.

(Testimony of John B. Bertero.)

A. As I say, I have no clear recollection of the provision of the venture agreement, there may be a provision in there, that the basic agreement would terminate. I haven't read them in years and years, so I wouldn't recall.

Q. I show you Plaintiff's Exhibit 31-G, which is, I believe, the venture agreement to which we have referred and which has been marked heretofore.

(Mr. Corinblit handing exhibit to counsel.)

I will show you, Mr. Bertero, Plaintiff's Exhibit 31-G for identification. I will first ask you to identify, if you will, the signatures on here of Mr. Joseph Schenck and Mr. Charles Skouras, wherever they appear. Those are their signatures? You don't have any doubt of that, do you? [382]

A. None whatever.

Q. I will call your attention to paragraph 15, beginning page 13, and running over to 14, and ask you to read that, if you will.

A. I referred to that other agreement, the basic, as being dated 1934. It says here it is dated 1933.

Q. You are right. A. So I was off a year.

Q. Yes. 1933 was the year.

A. I have read it, Mr. Corinblit.

Q. Does that refresh your recollection that they were linked together in the way that I stated, this is, if the basic agreement terminated, there was an option to terminate the four theatre venture?

A. I think you stated it differently before, but it does refresh my recollection, having read it.

(Testimony of John B. Bertero.)

Q. All right.

A. In other words, this states that if the basic agreement of September 1933 terminates, then either party to this agreement can terminate this agreement.

Mr. Corinblit: We will offer in evidence Plaintiff's Exhibit 31-G.

The Court: It may be received in evidence.

The Clerk: Exhibit 31-G. [383]

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 31-G.)

Q. (By Mr. Corinblit): Now, turning again, Mr. Bertero, to Loew's pictures first run in 1949, what was the arrangement, if you know, between Loew's and Fox whereby Loew's pictures automatically went into the group of three theatres, namely, the Los Angeles, the Wilshire and the Egyptian?

A. Well, I think there is a false assumption on your part there. At that time, taking them area by area, the Loew pictures were being offered in downtown Los Angeles in 1949 to any theatre operator that desired to negotiate and bid. Now, whether they offered or negotiated for those pictures, I don't know.

We had been playing the Loew pictures for years, I guess 20 years, in the Loew's State Theatre, and then we had been playing them in the Los Angeles Theatre later on, from about 1943. I think we were a very satisfactory account to Loew. In any event,



(Testimony of John B. Bertero.)

those were probably the two finest theatres in Downtown Los Angeles.

Now, in 1949, we exhibited the Loew pictures in the Los Angeles Theatre until we lost the lease of the Loew's State Theatre. We were literally kicked out on the street. Our lease had expired and Loew's evicted us. We would have like to have retained possession of the Loew Theatre, but our lease was terminated and they put us on the street in effect.

They took their own pictures and put them in their own theatre, Loew's State Theatre, in the latter part of 1949.

We took our own pictures, the Fox pictures, and put them in the Fox theatre, known as the Los Angeles Theatre.

Now, taking the other area, Wilshire Boulevard——

Q. This is 1949 now.

A. 1949. I have no recollection as to how pictures played on Wilshire Boulevard in 1949 except in respect of the two fine art policy houses, the Four Star and Fine Arts.

The Wilshire has played pictures of various distributors on various occasions first run in that area.

Going to Hollywood Boulevard, the Loew pictures had been playing in the Egyptian Theatre, oh, from at least, let's see, the Egyptian Theatre became a first run theatre in the war. It had previously been a first run theatre, and then during the depression of the early thirties it had to go subsequent run,

(Testimony of John B. Bertero.)

but the first run policy was restored in 1943, and Loew's licensed its pictures, the big pictures, of course, I mean, I don't mean the nondescripts, to the Egyptian Theatre from 1943 on down until, I think, Oklahoma was put into the Egyptian here a short while back.

I think that covers the Loew policy. I am uncertain about Wilshire Boulevard. My memory is poor on that one. But I know the Hollywood Boulevard situation and the downtown areas situation. [385]

Q. Now, let me see, Mr. Bertero. You said in 1949 Loew's offered their pictures to anybody who wanted to compete or bid, is that right, in 1949?

A. No, no. I said any exhibitor had the right to make an offer to license the Loew pictures, but I am sure that we would have been in that ring offering a competitive bid and a handsome film rental, and our house policy and our type of operation would have carried great weight in deciding who was the good bidder, the best bidder.

Q. But you didn't have to bid in 1949, did you?

A. I don't know. I don't think so. There is the possibility, because on one or two occasions—no. I think we licensed all the big Loew pictures at the Los Angeles Theatre until we lost possession of the Loew Theatre.

Q. And you know that in 1949 no other theatre had even a possibility of obtaining a Loew's picture in 1949 because they were committed to your theatre, isn't that true?

(Testimony of John B. Bertero.)

A. Let's put it this way. RKO was playing the outstanding RKO pictures, and perhaps certain Columbia pictures.

Q. Mr. Bertero——

A. Wait a minute. Let me finish my answer, Mr. Corinblit, because you put a semblance on this, and I want to state the fact.

The Paramount Theatre downtown at that time, I believe, was operated by Harry Arthur and [386] Marco, and they had, as I recall, a franchise for the Paramount pictures, so they weren't available to either the Los Angeles or Loew's, but in any event they customarily played and had played for years Paramount pictures.

The Warner Theatre played its own pictures in the Warner Downtown.

RKO played its own pictures at the RKO Theatre downtown.

Then there were certain companies, Columbia, Universal and United Artists, that didn't own theatres. Now, what more normal than that we play Fox pictures in our own theatre, the Loew theatre, while we had it, and later on the Los Angeles Theatre? We didn't need anybody's else's product while those pictures stood up.

Mr. Corinblit: Your Honor, I will move to strike the answer as not responsive.

The Court: Doesn't he have a right to explain his answer?

Mr. Corinblit: Yes, sir. I am perfectly willing

(Testimony of John B. Bertero.)

Mr. Bertero be given the fullest opportunity to explain if he would only answer the question I have asked first. He will certainly have all the opportunity to explain.

My question was whether or not it was not a fact, whether or not it was a fact that no other theatre had an opportunity of receiving Loew's first run pictures in 1949. [387]

Now, that either requires a yes or no answer, or I don't know, and then if he wants to explain, he can.

The Court: He has explained. Now you can answer yes or no, Mr. Bertero.

The Witness: Your Honor, I can't answer that question, because I don't know what Loew's was doing. I know we licensed the pictures. What they did, I don't know.

Q. (By Mr. Corinblit): You don't know what Loew's was doing?

A. Obviously I don't, Mr. Corinblit. They run their own business and we run our own.

Q. You don't know whether Loew's offered their pictures to any other theatre at all, do you?

A. The only time I know when a Loew's picture is offered somebody else is when a man is successful and it appears on his screen, and if I observe the daily paper and see that he is playing a Loew picture, I know he made a successful offer and is playing the picture. That's all I know.

Q. Now, Mr. Bertero, isn't this correct, that



(Testimony of John B. Bertero.)

with the rarest exceptions, at least from 1944 to 1949, Fox got virtually every single Loew's picture on first run Los Angeles?

A. I would have been terribly disappointed if we were unable to license Loew pictures customarily. Our performance was excellent. We needed the pictures. All we were concerned about is that we didn't pay too much for them, and we got a [388] lot of money at the box office. That is a fact.

Q. Mr. Bertero——

The Court: The answer is yes?

The Witness: The answer is yes.

Q. (By Mr. Corninblit): Now, isn't it a fact that from 1944 to 1949, with the rarest possible exception, you obtained those pictures without bidding for them?

A. Mr. Corninblit, I have in my office copies of all the competitive bids. It is a stack that high. I ask for them as routine, that they be sent to me. I cannot remember what pictures were bid for and what were negotiated for. It is impossible. [389]

The Court: Your answer is you don't know.

The Witness: I can't answer the question without reviewing a voluminous amount of documentary evidence.

Mr. Corninblit: Your Honor, at this time I would like to offer in evidence Plaintiff's Exhibit next in order, the play-off of Loew's pictures from January 1, 1945, to 1949.



(Testimony of John B. Bertero.)

Mr. Mitchell: Your Honor, we have sat here quietly while going into a period long ago.

We haven't heard of 1950 in this lawsuit yet. We haven't heard of 1950 when the Paradise Theatre started since the case opened on Tuesday.

And by your Honor's ruling we go back to 1949.

Now, as I told you yesterday, we are now rolling back and back to 1945.

I object to the offer of any play-off prior to 1949. It can't have a thing to do with this lawsuit. Indeed, 1949 has nothing to do with the lawsuit because at the end of 1949 the theatres changed hands.

There were new faces on the tee, and so what happened in 1949 has no more to do with the lawsuit than the flowers that bloom in May. Certainly 1949—1945 is far beyond your Honor's ruling. [390]

\* \* \* \* \*

The Court: The objection is overruled. That is Exhibit what?

The Clerk: Exhibit 46-A-11.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 46-A-11.)

Mr. Corinblit: It is received in evidence?

The Clerk: Yes.

Q. (By Mr. Corinblit): Mr. Bertero, I will ask you to examine Plaintiff's Exhibit 46-A-11 and ask you to state for the record whether you can find in this exhibit, which shows the play-off of Loew's pictures on first run for 1945, '46, '47 and '48, a

(Testimony of John B. Bertero.)

single picture—a single Loew's picture that did not play in the Fox West Coast houses.

A. Well, it is entitled "Loew's First Run Play-off 1945." If it is complete—I know the outstanding pictures of Loew's played from 1945 until our eviction from Loew's State in the Los Angeles theatre and then they went back to [393] Loew's, to its own theatre, and we only played the Fox pictures in the Los Angeles theatre after that date, and then going to Hollywood Boulevard in about October of 1943, as I recall the date, the Egyptian customarily played the top Loew pictures until I think lately—in short, at the time that Loew's—you see, the Egyptian Theatre was playing Loew's pictures at the time we lost our interest in November of 1949 and Loew's pictures continued to play in the Egyptian, although we had no interest in it.

Now, taking the list and answering your question categorically——

Q. You don't really have to examine the list, do you?

A. I have got dates on here, Mr. Corinblit.

Mr. Johnston: You asked him to examine it.

The Witness: Yes, and I want to be accurate.

In 1945 these Loew's pictures here which shows the theatre in which they played, were played in theatres in which Fox West Coast had an interest, either full or partial.

Q. (By Mr. Corinblit): All of them—every single Loew's picture played in Fox Theatres and Fox

(Testimony of John B. Bertero.)

Theatres only from 1945 to 1949. That is my question.

A. If it played in the Chinese in 1945 it played in a Fox Theatre. Now, however you phrase it it still comes out the same.

Q. Mr. Bertero, you can answer that question, can't you? [394]

A. The exhibit speaks for itself. Let me take a picture then so the jury will understand. It really is a funny title—Lost in a Harem, January 26, 1945.

That played in the Chinese on Hollywood Boulevard. It played in Loew's State downtown and it played in our Uptown Theatre and we had all three theatres, so you had a simultaneous exhibition first run Los Angeles on that picture. And the same applies to each picture throughout the year.

Q. And the same applies to each picture throughout 1945, '46, '47 and '48?

A. For the years covered on the schedule and the pictures covered on the schedule.

Q. Every picture played in a Fox house only.

A. Every picture that is on this schedule, is shown by this schedule, is shown to have been exhibited by Fox West Coast Los Angeles.

Q. And that is all, no other theatres?

A. There are no other theatres on there. There isn't—that is true, they are all our theatres in each instance.

Q. All right. Now, I just want to point out a couple of these theatres, Mr. Bertero.

(Testimony of John B. Bertero.)

In 1945 there was a picture of Dorian Gray played at the Ritz Theatre on Wilshire Boulevard. That had about 1,300 or 1,400 seats, did it?

A. About 1,400 seats, as I recall. [395]

Q. All right. The picture Waterloo Bridge played at the Four Star. How many seats did that have?

A. Four Star had roughly 900 seats.

Q. And the picture This Man's Navy played at the Guild. How many seats did that have?

A. My recollection of the Guild, as I heard the evidence come in yesterday, has about 850 or 900 seats.

Q. Now referring, Mr. Bertero——

Mr. Westbrook: Are you finished with that?

Mr. Corinblit: Yes.

(Document handed to Mr. Westbrook.)

Q. (By Mr. Corinblit): Now referring to the Loew's matter, Loew's product in Fox houses. It was a fact, was it not, Mr. Bertero, to your knowledge—I will withdraw that question.

In 1949, I think you testified that negotiations, or early in 1948 negotiations began looking toward determination of the document we have labeled as the "Basic Agreement" or Exhibit 31-F.

A. I don't know whether I said "began," but there were negotiations over a period of time and I think they really got down to a definitive form in about 1948, the spring of 1948.

Q. Now, isn't this a fact with respect to those negotiations, that you and United Artists [396]



(Testimony of John B. Bertero.)

Theatres Circuit agreed that Loew's pictures would be played thereafter in the Loew's State Theatre and the Egyptian Theatre, which would be transferred to the United Artists Theatres Circuit, Inc.; that you and United Artists Theatre agreed that Loew's pictures would be played in United Artists Theatres Circuit, Inc. wherever they had theatres in existence with Fox, and that you also agreed that you would not thereafter compete for Loew's pictures first run in the City of Los Angeles. Isn't that true?

A. The answer is there is no such agreement and your implication is completely false and I will demonstrate why.

We had an interest in the Egyptian Theatre down to 1949, November, and the Loew's State—we put the Loew pictures in there. We licensed them and booked them into that theatre from 1948 to 1949.

We lost our interest in the theatre and those pictures continued to play in that theatre.

Now, we also acquired 100 per cent of the Chinese Theatre at about that time as a part of the same transaction and the Fox pictures had played in the Chinese Theatre. They played in 1949 and 1950 and 1951.

Where would you play the Fox pictures if you had them on Hollywood Boulevard? You would take the world-famous Chinese Theatre.

What would be your second selection? It [397] would be the Egyptian Theatre.



(Testimony of John B. Bertero.)

Metro had outstanding products. It was normal to play them in a satisfactory theatre and that theatre was a satisfactory theatre. And I suppose got satisfactory returns from it.

Now, if I may also add I Will Cry Tomorrow played at the Fine Arts or—and the Four Star Theatre on Wilshire Boulevard for, I think, 15 or 16 weeks.

At one time we had an interest in the Fine Arts or the Four Star. We lost it in 1949.

We played Loew's pictures in there before we lost it and they played—and our competitor played a very fine picture here that we would have liked to have had.

All that happened was there was a shift in ownership in the theatres and not in product.

Q. Now, did Mr. Pirosh—didn't Mr. Pirosh tell you that he and Mr. DeCicco, of United Artists Theatres, had a discussion in which they had agreed that Loew's pictures would be played in Loew's, in the United Artists Theatres Circuit everywhere they were in competition with Fox and agreed not to compete with Fox, agreed not to compete for them. Did he tell you that? You can answer that yes or no. A. When?

Q. In 1949, in the fall of 1949.

A. No. If he did I have no recollection of [398] it, because I would be aghast if such an agreement had been made, and I would have immediately seen

(Testimony of John B. Bertero.)

to it that no agreement of that character could be made.

Q. Now, Mr. Bertero——

A. It is obvious it can't be made.

Q. Now, Mr. Bertero, didn't Mr. Pirosh tell you——withdraw that.

Part of your negotiations with United Artists Theatres Circuit at that time had to do with not only the Egyptian Theatre on Hollywood Boulevard, but even with the United Artists Theatre in Inglewood, isn't that right?

A. That is correct, sir. Wherever there was a United Artists Theatre we dealt.

Q. Now, wasn't there an agreement at that time that United Artists Theatre in Inglewood was to get Loew's pictures and Fox would not compete for them?

A. None to my knowledge.

Q. Wasn't there an agreement——didn't United Artists Theatres Circuit even in their negotiations with you ask that Fox see to it that the United Artists Theatre be turned over to it as a first-run theatre?

A. Oh, yes. That ran through, not definitely in the negotiations concerning the taking back, the surrender of the shares for theatres, but that would come up sporadically, being coupled with another item that they did not want us, and [399] I have got to cast you back to that climate or ear. United Artists people were very fearful that we would run down their theatres when it became evident to all that they were going to come to a deal.

(Testimony of John B. Bertero.)

So, they wanted us to keep their houses in top shape. We were the management of United West Coast Theatre Corporation. They wanted their carpets kept in repair. They wanted to have the paint kept up, and so forth.

That was one thing that was always in their mind. And, secondly, they did not want us to put the inferior pictures in their theatres and that was expressed to me by—to me by their lawyer on several occasions. And I think a comment of that character would be made throughout the entire negotiations and dissatisfaction would be expressed on the way the booking of the California-Berkeley—no, not the California, but the United Artists-Berkeley—they thought we were favoring our own 100 per cent-owned California, and I assured him the reason we couldn't play the better pictures at that time in the United Artists was that the distributor was insisting it go into our California, or whatever the particular reason was, but except as that came up in the general negotiations there was never any discussion about it. [400]

Q. Now, isn't this a fact, Mr. Bertero, that United Artists Theatres proposed to you that you turn over the United Artists Theatre to them as a first run theatre?

A. I think they wanted every theatre with the best policy and as a first run theatre in the locality in which it was located. That would be a natural, selfish spirit of a business man.

(Testimony of John B. Bertero.)

Mr. Mitchell: You are not talking about first run Los Angeles?

Mr. Corinblit: No, no.

Mr. Mitchell: The United Artists in Glendale?

Mr. Corinblit: The United Artists in Inglewood.

Mr. Mitchell: I mean the United Artists in Glendale.

Mr. Corinblit: That is the one I am talking about.

Mr. Mitchell: You are not talking about first run Los Angeles.

Mr. Corinblit: No, no, no. First run Inglewood.

Q. (By Mr. Corinblit): Now, let's see if we can't get this straight, Mr. Bertero. It is true they proposed that you turn over the United Artists to them as a first run theatre in Inglewood, that is true?

A. No. I only can recall generally in the discussions, I think Judge Medina represented United Artists Theatres Circuit at that time. He is now on the bench. He and his associate would occasionally caution me that their client wanted [401] those theatres turned back in good physical condition, wanted us to keep them adequately repaired, and also they wanted them properly booked so that they would not be run down in the public's mind as a subordinate type theatre. But other than that kind of discussion and cautioning, there were no discussions about any runs.

Mr. Corinblit: I will ask the clerk to mark for identification as plaintiff's exhibit next in order a

(Testimony of John B. Bertero.)

document which is unsigned, but which is addressed to Charles P. Skouras, care Fox Theatres Corporation, dated September 26, 1949.

The Clerk: Exhibit 49 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 49 for identification.)

The Court: Well, while you are examining the exhibit, it is nearly 3:00 o'clock and we will take the afternoon recess.

Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, and you are not to formulate or express any opinion as to the rights of the parties in this case until it is finally submitted to you. With that admonition, we will now recess until 15 minutes after 3:00.

(Recess.) [402]

The Court: Stipulate the jury is present in the box?

Mr. Johnston: So stipulated.

Mr. Corinblit: So stipulated.

The Court: You may proceed.

Q. (By Mr. Corinblit): Mr. Bertero, I will show you Plaintiff's Exhibit 49 for identification and ask you if you can tell me who was the author of this letter. It is unsigned.

A. Well, the letter is dated in September 1949. It is my recollection that it was written by Eugene



(Testimony of John B. Bertero.)

Sherpick, a law partner of Judge Medina, who represented United Artists Theatres Circuit.

Mr. Corinblit: We will offer in evidence, your Honor, selected portions of the letter dated September 6, 1949, subject to our right to offer the excerpted portions at a later time.

The Court: It may be received in evidence.

The Clerk: Exhibit 49.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 49.) [403]

\* \* \* \* \*

Q. (By Mr. Corinblit): Now, Mr. Bertero, I ask you again whether it was a fact that in the fall of 1949, just about the time this letter was delivered to you, that there was a discussion between United Artists and Fox West Coast whereby there was an agreement between you and United Artists that Loew's pictures would go to the United Artists Theatres wherever they were in competition with your theatres, and that you would not compete against United Artists for those pictures?

A. The answer definitely is no. [405]

Q. Mr. Bertero, did you tell Mr. Pirosh that an agreement between Fox and any other exhibitor with respect to division of product would be improper?

A. I have told that to Mr. Pirosh and to other members of the organization many times, that any agreement between our company and any competitor in regard to the maintenance of admission prices

(Testimony of John B. Bertero.)

is illegal per se, and any agreement between us and any competitor in regard to any arrangement in respect to the distributors' product is illegal; in other words, we cannot agree not to compete.

I further advised Mr. Pirosh he was under no obligation to disturb an otherwise quiet situation; where an exhibitor, large or small, was playing certain pictures and we had a sufficiency of product, I advised Mr. Pirosh it was good business to continue *the* play the same product and to negotiate for it; that we ought not to incite a disturbance which might result even in lawsuits. [406]

Q. Or bidding?

A. Obviously if we are getting the pictures of a distributor at prices agreeable to us, we are the last ones to start bidding among exhibitors where it becomes dog eat dog.

We are content as long as we are left alone. We don't incite bidding. The distributors are the ones who start the bidding. We don't. It is our policy to negotiate for pictures and mind our own business and if we can license the picture on negotiations when it is offered to us, on terms suitable to the distributor, we do so.

If we have to bid, we bid, but we don't like bidding.

Q. Well, now, Mr. Bertero, it is a fact that Mr. —didn't Mr. Pirosh tell you that these agreements, that you told him were illegal per se, that Fox had in fact entered into those agreements in the Inglewood area? A. Of course not.

(Testimony of John B. Bertero.)

Q. He didn't tell you that?

A. He wouldn't enter into any such agreement.

He may not be able to express himself before you in a deposition, but Mr. Pirosh knows the law and would not violate the law knowingly.

I have known the man for some 20 years.

But I am the one who cautioned him that he was not obligated to start bidding, and that was my policy, the company [407] policy, that if we had a sufficiency product we should remain content.

We just got through playing Dee Dee at the Chinese Theatre and we lost thousands of dollars, but we are going to make it up on a picture now playing there.

Mr. Corinblit: Now, your Honor, I don't know with respect to this matter, how we want to handle a statement made by Mr. Mitchell in his opening statement on this subject.

I would like to call that statement made by Mr. Mitchell to Mr. Bertero's attention.

The Court: Well, an opening statement is not evidence in this case.

Mr. Mitchell: We will accept my opening statement as being the fact. We will accept it as the fact and then the lawsuit will be over.

Q. (By Mr. Corinblit): Now, Mr. Bertero, calling your attention to the first run play-off in the Los Angeles area in 1949, 1950 and to the fall of 1951. It is a fact with respect to Universal pictures, that Universal pictures played in one or two Fox

(Testimony of John B. Bertero.)

theatres on Hollywood Boulevard and United Artists Theatre downtown, isn't that right?

A. That has been the testimony here, Mr. Corinblit, yes.

Q. And on behalf of Fox when you bought those pictures,—well, I will withdraw that question. [408]

It has also been the testimony in this case by Mr. Zabel, Mr. Bertero,—I want to know whether you agree with this—whether you agree with that testimony, that Hollywood and downtown are in substantial competition with each other. Is that your testimony?

A. I have a firm conviction that Hollywood and downtown Los Angeles are in substantial competition with each other on first run pictures.

Q. Now, do you know approximately the distance between Hollywood and downtown?

A. I would guess 12 miles, somewhere from ten to 12 miles.

Q. Now, I take it that when you bought Universal pictures for the Fox theatres on first run, you did not attempt with Universal to get clearance over the United Artists Theatre downtown, did you?

A. No. I don't recall that we did. I think Universal just said they wanted a downtown run, but I didn't participate in the negotiations in any matter regarding the licensing of Universal pictures. It would be hearsay.

Q. You didn't tell your people at Fox that Fox, as far as United Artists Theatre downtown was



(Testimony of John B. Bertero.)

concerned, had to have an exclusive in the City of Los Angeles on Universal pictures? You didn't tell your people that Fox could do that with respect to Universal pictures, did you? [409]

A. Our film buyers try to buy exclusive on pictures that merited an exclusive run.

On pictures that you might call the "action type of picture," they might try to license the picture on an exclusive run, but the distributors have a lot to say about it. It is their picture. They are the ones who generally tell us whether it is going to be an exclusive run or day and date run with other theatres.

Q. Now, Mr. Bertero, all I asked was whether or not you told the buyers whether they should ask for it.

A. I don't tell them their day to day type of business judgment to exercise.

Q. Then your answer is no? A. It is.

Q. You didn't tell them? A. It is.

Q. Now, with respect to the Inglewood-Westchester area.

You remember that the Academy Theatre located, according to Mr. Mitchell, about four and four-tenths miles from the Paradise, four and four-tenths miles from the Paradise, bought pictures on a 7-day availability from time to time, isn't that right?

A. I am sure it has over the years. It has licensed many pictures on the 7-day availability.

Q. Now, wasn't it your opinion that the Acad-



(Testimony of John B. Bertero.)

emy Theatre was in substantial competition with the Paradise Theatre?

A. Yes, definitely.

Q. Did you tell your buyers that they should negotiate for clearance over the Paradise?

A. Yes. I advised Mr. Pirosh, and I remember this only because a bid letter came to my attention the other day in reviewing, in supplying some of the documents to our counsel, I advised Mr. Pirosh—in fact I may have helped prepare the letter, although I don't have any recollection at this time, but where he put in an alternative bid, and I believe it was on a Paramount picture, and we are now talking back about the time the Paradise was opened, I told him he could offer so much, so many dollars for it at the Academy Theatre if he got the picture, if he had clearance over the Paradise, and so many less dollars to Paramount if we were not granted clearance.

In my judgment the Paradise and the Academy have a relationship—have a reciprocal rights relationship. They are each entitled—they are in competition and each is entitled to negotiate for a picture clearance over each other if the distributor would sell it. Some distributors won't sell it. That is their business judgment. We can't force them to exercise our judgment.

Q. But you remember specifically telling Mr. Pirosh [411] to ask for clearance for the Academy Theatre over the Paradise Theatre?

A. No, I have no specific recollection except that

(Testimony of John B. Bertero.)

I have always been of the firm opinion that the Paradise and the Academy and the Loyola are in completion, one with the other, and that they should have correlative rights and I am sure I advised Mr. Pirosh many times on that matter. But I don't have any specific recollection of a conversation. It is too many years ago.

Q. But you didn't ask Mr. Pirosh to ask for clearance of the Fox theatres in Hollywood over the United Artists Theatre downtown on Universal pictures, did you?

A. I am sure I didn't because at that time it was the practice of the distributors on some pictures, on many pictures to sell a downtown run, a Hollywood run day and date as we say in the industry, and sometimes a Wilshire run.

It would be like me talking to the breeze to tell a distributor how to license his pictures on first run Los Angeles and whether he should license it on an exclusive basis or day and day basis.

They don't pay any attention to us. They adopt their own distribution policy.

Q. Isn't this a fact, Mr. Bertero, that you didn't tell your buyer to ask for clearance over the United Artists Theatre downtown because you had an arrangement with United [412] Artists Theatre downtown on an inter-related arrangement whereby you were to get Universal pictures on first run, but you told them to ask for clearance of the Academy over the Paradise because the Academy wasn't in any arrangement with Fox West Coast?

(Testimony of John B. Bertero.)

A. No. The answer again, Mr. Corinblit, is quite simple.

When Universal licensed a picture in Hollywood like the other distributors, it wanted to compete against these other distributors and it wanted a downtown run.

It would be unreasonable to me as a person who has been in this industry a long time to think that Universal would sell a Hollywood run and not a downtown run except on a picture of unusual caliber.

And I hate to mention the Chinese Theatre again, but it illustrates what goes on in this business today.

One of the greatest pictures of all time, in my judgment, is playing at the Chinese. Fox will not permit us to play that in any other theatre. They want the exclusive run in the Hollywood metropolitan Southern California area, that one exhibition, just as Cinerama is playing exclusively in the Warner Theatre.

That is one instance.

Now, if they have an action picture they don't care many times whether they have simultaneous runs in downtown [413] Los Angeles and Hollywood.

I think King And I will not play in Southern California on an opening for possibly five or six weeks. The people in San Bernardino will not see it because there will be people from there who come in to Los Angeles and who have their shopping to

(Testimony of John B. Bertero.)

do during the day and they might take in a matinee to see King And I.

It will open in Bakersfield later and San Bernardino later, but that is the distributors' policy as to how they exploit and develop the picture to give the greatest return to pay for the four and a half million-dollar picture. That is their policy.

Q. I am not talking about the distributors' policy. Your testimony is you told Mr. Pirosh, as far as Fox is concerned, to ask for clearance over—from the Paradise over the Academy but you didn't tell him to ask for clearance over the United Artists Theatre downtown because you had an arrangement with United Artists Theatre downtown whereby you were to get Universal pictures on first run. But you did tell them to ask for clearance of the Academy over the Paradise because the Academy wasn't in on any arrangement with Fox West Coast despite the fact they were in competition?

A. That wouldn't come to my mind, Mr. Corinblit, because of the fact an established theatre, in the nature of the business,—the matter would come to my attention when the [414] Paradise was built. Mr. Pirosh would have come to me for counsel and advice and he did and I am sure I helped him to prepare the bid letter where we offered more money if we had the exclusive run and offered less money if we had to play simultaneously with the Paradise. [415]

Q. Now, Mr. Bertero, it is true that the Academy Theatre, referring just to Loew's pictures,



(Testimony of John B. Bertero.)

when the Academy Theatre bought Loew's pictures, it bought them with clearance over the Paradise?

A. Will you repeat that? When the Academy bought the Loew pictures?

Q. On first run Inglewood, it bought them with clearance over the Paradise.

A. I don't know. I don't know what the distributor sold. It is too long back. The records will speak for themselves. The contracts are there. I don't know.

Q. Mr. Bertero, you notice the Loyola and Paradise Theatres are located a few blocks from each other?     A. Yes.

Q. From the point of view of physical make-up and location, the Paradise Theatre is as suitable a theatre for first run as the Loyola is, is it not?

A. From the point of view of location?

Q. Yes.

Mr. Mitchell: Suitable to whom, your Honor?

Mr. Corinblit: Your Honor, here is the president of Fox West Coast.

The Court: Well, suitable for what?

Mr. Corinblit: Suitable for operation of a first run theatre. [416]

Mr. Mitchell: Suitable to whom? Some distributors like to license these small towns first run pictures and some don't. So those that don't, it won't be suitable for. Suitable to whom? An exhibitor? All exhibitors want a license first run.

The Court: In your opinion, was the Paradise Theatre as good as your theatre?



(Testimony of John B. Bertero.)

The Witness: I think that it has a very pleasing exterior. I have not been in the Paradise Theatre. I think so far as structure is concerned, that they are probably comparable. Perhaps the Paradise has a few more seats, but that doesn't mean much under present situations.

The Court: The location is good?

The Witness: I would give a slight edge to the Loyola on location, and I would also give the Loyola the edge on tradition. It was the first one there by some years. It is located close to Manchester. When the theatre was built, we were probably the principal business development there. I am the one who inspired the building of the Loyola, incidentally, your Honor. I think the location of the Loyola is slightly better than that of the Paradise.

The Westchester development was very small when I recommended we build a theatre there, and the homes were mainly down across on the north side of Manchester. We acquired the corner of Manchester and Sepulveda. [417]

Then the department store was built on the far side of the street over across Sepulveda. That was the next big development.

So the nucleus was around Manchester and Sepulveda.

Meanwhile, we had named the theatre the Loyola because Loyola University is out there, and put on several benefit type performances for the university, and we got sort of entrenched in the public mind out there and got a reputation.

(Testimony of John B. Bertero.)

But except for the fact that we have probably a little better location, and we had the tradition, and I think we were the ones who pioneered the community, I would say the buildings are comparable, certainly on the exterior, and I am sure Mr. Schreiber has good equipment, excellent equipment in his theatre. So that is the best way to answer that one.

Q. (By Mr. Corinblit): You couldn't just say yes or no, whether the theatre is suitable for first run?

The Court: He is an attorney. He can't say yes or no.

The Witness: I think there was a colloquy between his Honor and counsel, too, that intervened as to what the word suitability meant.

Q. (By Mr. Corinblit): The Loyola Theatre did operate on first run pictures from the day it opened until this very day, isn't that right?

A. Well, yes, Fox pictures, Mr. Corinblit. Remember [418] that Fox West Coast and Fox Film, Twentieth Century-Fox were one and the same in the sense that they owned all our stock, and they were the only company who would license what you might call the better pictures, in other words, that was a Fox house. Fox put its own pictures in there for its own reasons. We were glad to get them.

But no one else licensed us pictures, and to this date—well, I won't say to this date because there have been so many changes in the last few years,

(Testimony of John B. Bertero.)

but all I can recall is the Fox pictures going into the Loyola.

Q. The Loyola was built in 1946, is that right?

A. I think that is the year, yes.

Q. How was the development in Westchester in 1946? Pretty big or kind of small?

A. Very small. I will tell you the circumstances under which we picked the location.

Q. Could you just wait and let me ask a couple of questions. I am sure you will get all the chance you want to explain.

A. Well, what do we mean by small? I can narrate what I thought when I recommended to Mr. Skouras the construction of a theatre in that area. Can I describe the physical area?

Q. Before you do that——

A. All right.

Q. When you opened the theatre in 1946, you opened its [419] doors on a first run policy, is that right?

A. We put in a Fox picture first run, that is, Fox said they would let us have a picture first run to spring off the theatre, to give it a fine send-off, with lights, stars, and so forth.

Q. From that date, from 1946 on, it has been a first run theatre, right?

A. Fox has licensed its pictures through the years to that theatre except on large pictures. The King And I is not playing at the Loyola.

Q. But my question is not whether the King And I was playing, but just the simple question

(Testimony of John B. Bertero.)

whether from 1946 on it has been operating first run pictures.

A. With Fox pictures, I thing almost exclusively, ignoring the end of the second double bill. It was a Fox theatre showing Fox pictures first run out there in that area, but there may have been an exception when certain big pictures had an exclusive first run in Los Angeles and didn't play day and date.

The Court: When you say first run in that area, you mean first run simultaneously with other first runs in Los Angeles?

The Witness: Normally, your Honor, the Loyola Theatre from the date of its opening has shown the normal supply of Fox pictures day and date with the Chinese Theatre, [420] but occasionally during that period, I think there were certain large pictures, as I recall it, which played the Chinese Theatre, which did not play the Loyola Theatre simultaneously.

Q. When you had the idea of building the Loyola Theatre, actually the idea for the Loyola Theatre was to make it a first run theatre, is that correct?     A. No.

Q. It was not the idea?     A. No.

Q. Just a minute. Did Mr. Bowser ever tell you that was the idea?

A. I am the one who went to Mr. Skouras and generated the idea of building the Loyola Theatre, and if you want to hear the story, I will be pleased to tell it to you, but if you want it piece meal, I



(Testimony of John B. Bertero.)

will have to give it to you that way, Mr. Corinblit.

Q. Just let me get this out of the way first. Who was Mr. Bowser in 1946?

A. 1946, he was the general manager of Fox West Coast Theatres Corporation at that time, that is, he was general manager in charge of the operation of theatres.

Q. And you were a lawyer?

A. I was a lawyer, business executive, vice president of the company, concerned with financial and real estate matters and corporate matters. [421]

Q. You were all these things from 1946 to 1951?

A. As I testified this morning, from 1942 on.

Q. All right. Did Mr. Bowser tell you that he as general manager of the theatre wanted that theatre to be a first run theatre?

A. I don't recall that he did. He may have at some time——

Q. Have you read his deposition in this case?

A. No, I haven't.

Q. Have you spoken to him about that matter?

A. I haven't seen Mr. Bowser in at least a month. I saw him on the street just to say hello to him about a month ago, but other than that I haven't seen him in the last year.

Mr. Corinblit: With the assurance that your attorneys will ask you the questions to permit you to expand on matters we have discussed, Mr. Bertero, I don't have any further questions.

Mr. Johnston: May I have that. I didn't hear what the comment was.



(Testimony of John B. Bertero.)

The Court: He has turned the witness over to you.

Mr. Johnston: What did he say?

(Record read.)

Mr. Johnston: you mean we may cross examine Mr. Bertero now?

Mr. Corinblit: Sure. [422]

Mr. Johnston: I have no questions.

Mr. Mitchell: No questions.

The Court: You may step down.

Mr. Corinblit: Your Honor, I want to make a record again here with respect to Mr. Bertero. We are excusing him subject to a right——

Mr. Johnston: He will be produced on your request again.

The Court: All right.

The Witness: I have made it clear I will be out of town all next week, but I will be available any time after my return at the end of that week.

The Court: All right. This case will probably go beyond a week.

The Witness: I am sure it will, your Honor.

(Witness withdrawn.)

Mr. Corinblit: Plaintiff will call under 43(b) as an adverse and hostile witness, Mr. George Hickey.

GEORGE A. HICKEY

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, Mr. Hickey, your full name?

The Witness: George A. Hickey.

The Clerk: H-i-c-k-e-y?

The Witness: -e-y, yes.

The Court: Mr. Hickey, at the request of one of the attorneys at the beginning of this case I required the members of the jury to tell me how old they were. Some of them talked very low. They didn't talk up. I don't know how old you are, but can't you talk a little louder? These jurors have to hear what you say.

The Witness: All right. I will do that. I would like to have him talk a little louder to me, too.

The Court: All right, both of you talk up.

Direct Examination

Q. (By Mr. Corinblit): Mr. Hickey, by whom are you employed?     A. I beg your pardon?

Q. By whom are you employed?

A. Loew's Incorporated. [424]

Q. How long have you been employed by that company?

A. Ever since they have been in business, 31 years.

Q. What is your position with that company?

A. Sales manager.

(Testimony of George A. Hickey.)

Q. Sales manager. What is your jurisdiction?  
Over what area are you sales manager?

A. Pacific Coast.

Q. How long has that been true?

A. How long has what?

Q. How long have you been the Pacific Coast sales manager?

A. Oh, I would say about 20 years, approximately 20 years.

Mr. Mitchell: Could we have both Mr. Corinblit and Mr. Hickey raise their voices? It doesn't do any harm to talk a little bit louder. I don't believe Mr. Hickey can hear Mr. Corinblit, and I know that Mr. Hickey can talk louder.

The Court: All right. Mr. Corinblit, you lead the way and you speak a little louder.

The Witness: All right.

Q. (By Mr. Corinblit): Now, Mr. Hickey, calling your attention to the year 1949, did you know Mr. Pat Di Cicco? A. Yes.

Q. Who did you know him to be? [425]

A. I beg your pardon?

Q. Who did you know him to be in 1949?

A. Well, I believe he was representing United Artists at that time.

Q. That is United Artists Theatres Circuit, Inc., is that right? A. Yes.

Q. Did you know Mr. Bert Pirosh at that time?

A. Yes.

Q. Who did you know him to represent?

A. Well, at that time he was the buyer and

(Testimony of George A. Hickey.)

booker of—I believe he was the buyer at that time. I know he was the booker of West Coast at that time. Later on he was made the buyer.

Q. You were in charge of the sale of Loew's motion pictures. As part of your duties, you were in charge of the sale of Loew's motion pictures on first run in Los Angeles and in the Inglewood-Westchester area, is that right?

A. I am in charge of Loew's Incorporated and the pictures all over the Coast down to the Hawaiian Islands and the Island of Guam, up to Alaska.

Q. That includes Los Angeles first run and the Inglewood-Westchester area? A. That is true.

Q. In 1949, do you remember discussing with Mr. [426] Di Cicco Loew's pictures to be played in the United Artists Theatres Circuit? A. Yes.

Q. You did discuss that matter with Mr. Di Cicco? A. Yes.

Q. Did Mr. Di Cicco tell you he and Fox West Coast had had a discussion, Mr. Bert Pirosh had a discussion, in which they had agreed that United Artists Circuit theatres should play Loew's pictures wherever the two theatre groups were in competition and Fox would not compete for them? Did he tell you that?

A. No, he did not. It wouldn't make any difference, if I might say so, whether he did or didn't but he didn't. I am only interested in marketing our pictures to the best theatres at the terms that we feel is good for us, and it doesn't make any differ-

(Testimony of George A. Hickey.)

ence whether they have agreements among themselves or not. If I don't get the right terms, I don't sell.

Q. Mr. Di Cicco did not have a conversation with you in which he told you of that agreement with Mr. Pirosh, is that right? A. No, he did not.

Q. Is it your testimony that Mr. Pirosh never had such a conversation with you in which he told you of that agreement with Mr. Di Cicco?

A. I don't remember of ever talking to Mr. Pirosh about [427] that.

Q. In 1949, referring only now to the Inglewood-Westchester area, did Mr. Pirosh or Mr. Di Cicco tell you that he and the other one of the group had agreed not to bid on Loew's pictures—I will withdraw the question.

Did Mr. Di Cicco tell you he and Mr. Pirosh had agreed Fox would not bid on Loew's pictures?

A. No, he did not.

Q. Now, did you in your own mind come to the conclusion that there was such an agreement in existence in 1949?

A. Well, we generally do believe that there is something of that nature when only one bids, and the only one that bid at that time was the United Artists Theatre in Inglewood, but it was never told to me by anybody that they ever got together. [428]

Q. You just did conclude that in your own mind?

A. That is right. I could be right and I could be wrong.



(Testimony of George A. Hickey.)

Q. Now, after you concluded that in your own mind did you discuss the matter with Mr. Pirosh at all?

A. No. We asked for bids and if the bids were satisfactory we took them and if they are not satisfactory we turn them down.

Q. But you did not——

The Court: May I ask a question?

Mr. Corinblit: Certainly.

The Court: If you got only one bid would that satisfy you?

The Witness: If it was satisfactory we took it and if it wasn't satisfactory we turned the bid down and we renegotiated with everybody.

The Court: Well, it wouldn't be unsatisfactory because only one party bid, is that right?

The Witness: Well, it could be unsatisfactory, your Honor, because if it wasn't what we thought the picture was worth we certainly wouldn't sell it, even though we had to stay out of the town.

The Court: Well, if you got a bid from one company and you thought it was reasonable and it was what the picture was worth you would accept it.

The Witness: Yes, sir.

The Court: Even though you only got the one bid.

The Witness: If it was acceptable we would take it.

The Court: So, you didn't turn it down on the theory that you had only one bid?

The Witness: No, no. No, no.

(Testimony of George A. Hickey.)

Q. (By Mr. Corinblit): Now, did you ever ask Mr. Pirosh why he wasn't putting in bids against United Artists?

A. No. We had no reason to ask him. If the bid is satisfactory we take it.

Q. And you didn't ask him why he wasn't bidding? A. No.

Q. And, as a matter of fact, at that time you knew that the La Tijera Theatre in that area was not bidding? A. Yes, sir.

Mr. Mitchell: What time is that?

Mr. Corinblit: 1949.

Q. (By Mr. Corinblit): You knew that the La Tijera Theatre wasn't bidding, isn't that right?

A. That is right.

Q. And even though they weren't putting in bids you say you didn't discuss that with Mr. Kupper of the La Tijera Theatre, did you?

A. No. If we get a bid and the bid is what we generally—we generally send the bid out and we say we want 50 per [430] cent. Now, if we get the 50 per cent or if we get 40 per cent and we think the length of the run in that theatre will give us the revenue that we think we are entitled to, why, we will accept it and there is no reason for us to go any further.

Q. In other words, there is no reason for you to find out whether or not the Fox Theatre would give you more money or more playing time?

A. Well, I said a few minutes ago that we are not interested in whether the exhibitors get together

(Testimony of George A. Hickey.)

with themselves or not. That doesn't interest me, because if we get a satisfactory rental and a satisfactory bid we take it.

Q. And your answer to my question is—you remember my question was that you were **not** interested in finding out whether Fox was willing to give you a more satisfactory offer.

A. Well, if we feel that 40 per cent to 50 per cent is good terms we generally take it, because if the picture is good and it draws and hits, why, we will earn the 50 per cent.

If it is not that kind of a picture, then we are not entitled to any more money than the bid.

Q. Do you remember how large the United Artists Theatre was? A. How large it was?

Q. How many seats.

A. Well, I don't think the United Artists Theatre—this is only a guess, I really don't know—

The Court: Inglewood.

Mr. Corinblit: Yes.

The Witness: Talking about Inglewood. This is only a guess. I would say that the theatre seats about 800.

Q. (By Mr. Corinblit): And the Academy Theatre?

A. And the Academy Theatre would seat about 1,200—1,400.

Q. It is your testimony that you didn't care whether you received a bid from the Academy which would give you more money than you got from a smaller theatre, the United Artists Theatre, is that

(Testimony of George A. Hickey.)

right? A. Right.

Q. It doesn't matter to you?

A. It doesn't make any difference in our business. We can get a great many times more money out of the small theatre with 800 seats than we can out of a theatre with 2,000 seats, because a theatre with 2,000 seats will run the picture a week while the theatre with 800 seats will run it seven or eight weeks and sometimes longer.

It takes us a little longer to get the money out of a small theatre than it does out of a big theatre, but we eventually get as much money and, a great many times, more money.

Q. Now, Mr. Hickey, as a matter of fact, even though in your mind you had concluded that there was some kind of an arrangement between the exhibitors in the area—— [432] A. I have what?

Q. I say even though in your own mind in 1949, you concluded that there was an arrangement between the exhibitors, Loew's continued to send out bid letters, isn't that right? A. That is correct.

Q. In other words, you knew in 1949 that only one theatre was going to bid for your pictures and you sent out bid letters regularly, week after week, to all of the theatres, is that right?

A. I do not know that there were only one theatre going to bid. The reason we sent out bid letters was because somebody was asking for the pictures that didn't have them. In other words, West Coast was running our pictures, I believe, there at one



(Testimony of George A. Hickey.)

time and another exhibitor or two would ask us for the pictures, so we would say, "All right, you can bid for them," so we gave everybody a chance to get them by bidding for them.

Now, if they get together after that, that doesn't interest me. I am only guessing that they get together. I don't know that. Nobody ever told me that: "I agreed with him not to bid on your pictures."

If they get together that is none of my business as long as I get satisfactory terms and in the proper theatre for my pictures.

So, we keep sending out bid letters all the time.

Q. Now, Mr. Hickey, in February of 1950 you remember, do you not, that Mr. Schreiber made a—came to you and made a request to play Loew's pictures on first run or on seven days, isn't that right? A. I remember that.

Q. And with respect to the seven-day run you told him that he should bid for the pictures, is that right? A. That is right.

Q. Now, at that time you knew, didn't you, that there was in existence in the Inglewood area an arrangement whereby—designating what theatre was to get your pictures first run in the area?

A. I told you that I did not know that. I imagined or guessed that there might have been some arrangement. I didn't say I knew.

Q. Did you make any inquiries from any of the parties?



(Testimony of George A. Hickey.)

A. No, because I said a few minutes ago that it doesn't interest me whether they get together or whether they don't get together as long as my terms are satisfactory to me.

Q. Did you tell Mr. Schreiber, "Now, you are going into an area, Mr. Schreiber. I suspect, I guess that there is an arrangement in that area allocating Loew's pictures to the United Artists Theatre"?

Did you tell him that?

A. I didn't tell Mr. Schreiber anything [434] like that because I didn't know it.

Q. Did you tell him that you suspected it?

A. No, I didn't tell him I suspected it.

Q. Did you make any memoranda of this guess?

A. No.

Q. Did you discuss it with anyone else?

A. No.

Q. You didn't write a letter to the home office about it? A. No.

Q. Or discuss it with Mr. Aspel? A. No.

Q. Now, Mr. Hickey, at the end of 1949 and the beginning of 1950, referring to first run Los Angeles, in 1950 your pictures played first run Los Angeles in United Artists Theatres Circuit theatres, isn't that right?

A. Well, in what theatre are you referring to?

Q. I am talking about the Loew's State and the Egyptian Theatres, which at that time, in 1950, belonged to United Artists Theatres Circuit.

A. That is correct.

(Testimony of George A. Hickey.)

Q. So in 1950, the early part of 1950 first run was being played, Loew's product, in the United Artists Theatres Circuit theatre downtown and first run on your pictures was being played in the United Artists Theatre in Inglewood. Is that right?

A. In Inglewood?

Q. They were playing first run in the United Artists Theatre in Inglewood.

Mr. Westbrook: Seven-day availability.

Mr. Corninblit: Yes, on the seven-day availability.

The Witness: Yes.

Q. (By Mr. Corninblit): And in Los Angeles on the first run they also were playing in the United Artists Theatres Circuit theatre, namely, the Loew's State and Egyptian? A. That is right.

Q. But it didn't play in Inglewood for seven days after. A. No.

Q. Didn't Mr. DiCicco tell you that part of the agreement, the arrangement with Mr. Pirosh was that Loew's pictures first run would go to United Artists Theatres in Los Angeles and Loew's pictures on seven days would go to the United Artists Theatre in Inglewood? A. No, he did not.

Q. And did Mr. Pirosh tell you that?

A. No, he did not.

Q. Did you suspect there was an arrangement with respect to this matter? A. No.

Q. You did not even have a suspicion on that matter? A. No. [436]

(Testimony of George A. Hickey.)

Q. Now, you know, however, in early 1950 that Fox did not, after the first part of 1950, try to get Loew's pictures on first run in Los Angeles, don't you? A. I didn't understand that.

Q. All right. In 1950, the early part of 1950 when Loew's pictures went into the Loew's State downtown, Fox West Coast did not try to get those pictures from Loew's first run?

A. Well, I probably didn't want to play anywhere but the State Theatre downtown, Loew's State Theatre. I wanted that theatre.

I never wanted to play in the Los Angeles Theatre for two reasons. First, the Loew's State Theatre is situated on the corner of Broadway and 7th Street, which is the best corner in the City of Los Angeles downtown.

The Los Angeles Theatre is a block away and it is situated in the middle of that block and is not a good location. It is not as good a theatre and it has 400 seats less, and that is the reason that I wanted to play my pictures in the State Theatre, because I could earn more money for my company. That is the only reason.

Q. Now, Mr. Hickey, I have just a simple question on this point, not with respect to what Loew's wanted, but what Fox did. Did Fox in the beginning——

Mr. Mitchell: Fox West Coast.

Q. (By Mr. Corinblit): Fox West Coast in the beginning, [437] in 1950, try to get Loew's pictures from you first run in Los Angeles?

(Testimony of George A. Hickey.)

Q. Where?

Q. Downtown Los Angeles.

A. Did Fox try to get them?

Q. Yes.

A. Well, I am not sure about the dates now, but around that time, if I am not mistaken—was that the time that the lease on the theatre changed hands? I am not sure about that. But there was a period there where the State Theatre was taken back from Fox after their lease run out and the Loew's Incorporated was going to run the theatre themselves. I am not sure about the date. [438]

Q. Perhaps I haven't made my question clear. In early 1950, did any buyer from Fox West Coast ever come to you and say, "Mr. Hickey, I want to buy your Loew's pictures first run Los Angeles"? Did Pirosh ever say that to you in 1950?

A. Everybody said that to me. They all want to buy Metro-Goldwyn-Mayer pictures because they are the best pictures, so everybody tells me [439] that.

\* \* \* \* \*

Q. Mr. Hickey, I think yesterday we ended the session with your statement as to the fact you thought that Loew's product was a very good product, Loew's pictures were very good pictures. And I take it, like any distributor, your opinion was that you had some pictures that were better than [443] others—I mean as a general matter that is true, isn't that right, but Loew's always, in your opinion, certainly had quite superior pictures for



(Testimony of George A. Hickey.)

the market? A. I can't hear you.

Q. Loew's, in your opinion, certainly had a very good picture to market—had very good pictures to market generally, isn't that correct?

A. They have the best.

The Court: That is what he said yesterday.

Mr. Corinblit: I wanted him to say it again so we could get it clear.

Q. Now, the evidence in this case, Mr. Hickey, shows, one of the exhibits that has been introduced in the case, shows that in 1949, up to about November of 1949, all of the Loew's pictures went to Fox West Coast. As a matter of fact, the evidence in this case introduced so far shows that from 1945 through the latter part of 1949 all of Loew's pictures went to Fox West Coast.

I want you to take a look at those schedules in a minute, but it is a fact, is it not, Mr. Hickey, first turning your attention to the period in 1949 and 1950, you didn't talk to anybody that had the Warner theatres in Los Angeles about selling your pictures to them in 1949 or 1950, did you?

A. Yes; we talked to everybody but there was no room for our pictures in the Warner theatre because the Warner [444] theatres play their own pictures.

Q. Now, I take it you remember, do you, that somebody from Warners talked to you in 1949 or '50? A. We talked to everybody.

The Court: That is not the question. Do you remember yourself personally?



(Testimony of George A. Hickey.)

The Witness: Yes, I have talked to Mr. Wallenstein many, many times about our pictures downtown.

Q. (By Mr. Corinblit): Do you remember I took your deposition in this case?

A. What is that?

The Court: Keep your voice up.

Mr. Corinblit: Yes. I think there is a problem with my throat.

May I have the original of Mr. Hickey's deposition.

(Document handed to Mr. Corinblit.)

Q. I will show you the original of the deposition which has been filed in this case, Mr. Hickey, and ask you if this is your signature on page 45?

A. That is right.

Q. And this indicates it was subscribed and sworn to on the 11th day of July, 1956—that is just yesterday or the day before, is that right?

A. That is right.

Q. Now, I call your attention to page 15 of that [445] deposition and the following question.

Mr. Mitchell: Just a minute before you read it. Let him read it, please. It may not be proper—it may not be impeachment at all.

The Court: Yes, let the witness read it.

Mr. Mitchell: What line?

Mr. Corinblit: The question at line 2 and the answer at line 5. [446]

The Witness: That is what I said now. They run their own pictures.

(Testimony of George A. Hickey.)

Q. (By Mr. Corinblit): Does this refresh your recollection, Mr. Hickey, that Warner's theatres did not talk to you about licensing your pictures first run after 1949?

A. Well, it is just what I say here. I am quite sure they didn't, because they run their own pictures.

Q. Yes. All right. Without regard to the reason, the fact is that after 1949 Warners did not talk to you about licensing Loew's pictures?

A. Well, I don't talk to every buyer or booker. We have salesmen and managers to do that. I am the head of this division, and they do that.

The Court: Mr. Hickey, the question isn't what they do. The question is what you did. Did you talk to them personally?

The Witness: I might have and I might not. That I can't remember, whether I talked to them personally or not.

Q. (By Mr. Corinblit): You say you might have and you might not? A. Yes.

Q. But in your deposition, Mr. Hickey, just taken on June 20th, which you signed yesterday or the day before, you state, "I am quite sure they didn't." You were quite sure yesterday that they didn't talk to you, and now you are uncertain. [447]

A. You might say you are quite sure, but that doesn't mean that you did or you didn't.

Q. Now, after 1949 or 1950, did you talk to anybody at the RKO Hillstreet or Pantages Theatre about selling your pictures first run to them?

(Testimony of George A. Hickey.)

A. Well, that is generally handled in New York, because the New York office of RKO——

The Court: Mr. Hickey, that is not the question.

Mr. Corinblit: I move to strike the answer.

The Court: The question is, did you yourself personally talk to them?

The Witness: No.

Q. (By Mr. Corinblit): The fact is that after 1949 or 1950, you did not talk to anybody at the Paramount Theatres to play your pictures first run, did you, you personally?

A. Well, I don't remember that.

Q. I want to show you, Mr. Hickey, Plaintiff's Exhibit 46-A-11 in evidence, which is the Loew's play-off from 1945 to 1949. Let's start with 1945.

You will notice in this list—this list incidentally is stipulated to by your counsel to be a complete list of the play-off of Loew's pictures during this period.

Mr. Westbrook: Subject to correction.

Mr. Corinblit: Subject to correction, yes.

Q. Run your eye down the name of theatres along the [448] side for the year 1945. The first two pages are 1945.

A. Well, I believe this is——

Q. I haven't asked a question yet, Mr. Hickey. Now, my question to you is this. It is true, is it not, every single theatre on that list is a Fox theatre?

Mr. Mitchell: You mean was a Fox theatre at that time.

(Testimony of George A. Hickey.)

Mr. Corinblit: Yes.

The Witness: In 1945?

Q. (By Mr. Corinblit): Yes. Just that question.

A. Yes.

Q. Now, I want you to run your eye down, if you could, the next two pages, which are 1946. My question to you is this. Is it not a fact that every theatre on that list was a Fox theatre?

A. Yes.

Q. I will ask you to do the same thing for—well, these are the last of 1946. I think you will find they are the same, is that right?

A. That's right.

Q. I will ask you to examine the year 1947 and state whether or not every theatre on that list was at that time a Fox theatre?

A. Yes.

Q. I will ask you the same thing for 1948. State [449] whether every theatre on that list was not a Fox theatre?

A. That is correct.

Q. Now, Mr. Hickey, just as in 1949, after 1949, prior to 1949, at least beginning from 1945, you never talked to anyone, you never talked to anyone representing Warners to try to get your pictures into their theatres, did you?

A. Well, I talked to so many people, I can't remember who I talked to.

Q. You have no recollection of ever talking to a Warner's person, do you?

A. We talk to everybody. We don't miss anybody.

Q. I think you testified you had top pictures at



(Testimony of George A. Hickey.)

Loew's, is that right? A. That's right.

Q. Is it your testimony that with these top pictures from 1945 to 1949, you couldn't sell a single picture to RKO, to Warners, or to Paramount, or to any independent theatre in this city? Can you answer that yes or no?

A. No, I don't say that. But I will have to explain it. RKO run their own pictures, so their theatres are tied up.

Warners run their own pictures, so their theatre is tied up.

The Paramount, I believe at that time they had a franchise with the Paramount producing company, and they run [450] nothing but Paramount, so that was tied up.

There was no place for us to go but to the other two best theatres downtown, and those theatres are Loew's State and the Los Angeles Theatre. [451]

Q. Now, Mr. Hickey, you have made a statement and I would like if you would just answer my question.

It is a fact from 1945 to 1949 that you did not solicit any one of these companies that I have enumerated to play your pictures on first run?

Mr. Mitchell: Wait a minute. I object to that on the ground it has just been asked and answered. He said no, and he explained why he didn't, because there wasn't any theatre available except the Los Angeles and Loew's State. It has just been asked and answered.

The Court: Overruled. Answer the question.



(Testimony of George A. Hickey.)

The Witness: Well, I can't remember that because I don't do all of the selling. As far as that is concerned I do very little selling.

We have men to sell our pictures and I can't remember. I can't answer that question.

Q. (By Mr. Corinblit): As far as you are concerned, however, you did not solicit any of these people?

A. I don't remember it. I might have.

Q. But the record shows you were never able to sell a single picture, good or bad, to any other theatre in the city of Los Angeles, is that right?

A. No.

Mr. Mitchell: The record speaks for itself, your Honor. That is just argumentative. [452]

The Court: Well, you are talking about first run pictures?

Mr. Corinblit: Yes, your Honor.

The Witness: No, I wouldn't say that. I wouldn't say that we didn't try to sell because we tried to sell everybody. But when a theatre is tied up, how are you going to sell them?

Q. (By Mr. Corinblit): Mr. Hickey, if we could just get the one question whether you tried to sell it to these theatres from 1945 to 1949.

A. Well, I can't answer that question without telling you again that these theatres were tied up with other pictures and it was impossible to sell them.

Now, if you are asking me if I personally tried to sell them, I don't remember that.

(Testimony of George A. Hickey.)

Q. Now, it is a fact, Mr. Hickey, is it not, not only didn't you try to sell your pictures to any other theatre but the fact is that no representative of RKO, no representative of Pantages, no representative of Warners or of Paramount ever solicited you to play Loew's product during this period, isn't that correct?

A. No, I wouldn't say that it was correct because I don't remember whether they did or did not.

Q. Mr. Hickey, not only is this record that I have shown you, Plaintiff's Exhibit 46-A-11 through 1945 on, but wouldn't you say that the same facts would be shown if [453] you were to see the play-off of Loew's pictures beginning at least as early as 1940?

Mr. Mitchell: Wait a minute. I object to that on the ground it assumes a fact not in evidence. He says from 1945 on and it isn't true from 1945 on.

The Court: Objection sustained.

Mr. Mitchell: If he will show him the 1949, '50 and '51 play-off he will find that is not true, so it is assuming a fact not in evidence.

The Court: It is going back beyond the period of damage here, which was 1950. I don't want you to go back as far as 1940. There is such a thing as running a good thing into the ground, you know.

Mr. Corinblit: Yes.

Q. Now, Mr. Hickey, you remember, don't you, that actually during the period '45-'49, not only was it true that Loew's played their pictures only in Fox theatres, but the fact was also true that—the

(Testimony of George A. Hickey.)

fact was also true that at least beginning in 1945, substantially all of Columbia product went to the the Pantages Theatre, isn't that right?

A. I don't know anything about that.

Mr. Mitchell: You are talking about first run pictures?

Mr. Corinblit: First run, yes.

The Witness: I don't know anything about Columbia.

Q. (By Mr. Corinblit): And it is also true during that [454] period substantially all of RKO pictures went to the Pantages Hill Street Theatre?

Mr. Mitchell: You are talking about first run?

Mr. Corinblit: Yes.

Mr. Johnston: And you have been talking about first run all the way through, isn't that right?

Mr. Corinblit: Yes.

Q. Isn't that true?

A. I am only interested in Metro Goldwyn Mayer pictures. I don't know anything about any other company.

Q. I just thought a minute ago you stated that you knew that the RKO Theatre played the RKO pictures? A. Yes, they did.

Q. Now, it is also true during this period that the Warners' pictures played only in the Warners' theatres, isn't that right?

A. As I said before, I don't know anything about any other company, only I know this, that Warners and Fox and RKO played their own pictures and had no room for our pictures.

(Testimony of George A. Hickey.)

Q. Now, it is also true, is it not, Mr. Hickey—I will withdraw that.

Mr. Corinblit: Your Honor, at this time I would like to offer into evidence the remainder of the play-off from 1945 to 1949—let me before I make that offer ask another question. [455]

Q. Mr. Hickey, in fact you know that from 1945 to 1949 there was in effect in the Los Angeles area an allocation of first run pictures whereby Fox was allocated the Loew's pictures; after 1946 Fox was allocated the Universal pictures; Fox was allocated the Twentieth Century-Fox pictures and no one ever tried to take those pictures away from Fox, and that there was an arrangement in Los Angeles whereby Columbia pictures was allocated to the RKO Theatre and RKO pictures were allocated to that group of theatres and no one ever tried to take away those pictures from the RKO Theatre——

Mr. Mitchell: That is argumentative, but I am not going to object to it, so he may answer the question.

The Court: Just a minute. Let him finish. He hasn't finished his argument yet.

Q. (By Mr. Corinblit): And you also know during that period there was an arrangement whereby Warners pictures went to the Warner theatre and the Warner theatres would never try to compete for either the pictures of any other company and the same thing was true with respect to Paramount pictures.



(Testimony of George A. Hickey.)

Now, you know there was such an arrangement in Los Angeles from 1945 to 1949, do you not?

Mr. Mitchell: Your Honor, it is a very argumentative question but I want him to answer it so I won't object.

The Witness: Well, I don't exactly understand what he [456] means when you say that I know. I don't know anything about anybody's pictures but our own. [457]

Mr. Corinblit: Your Honor, I would like to offer in evidence at this time the remainder of the schedule from 1945 to 1949.

Mr. Mitchell: What is the remainder of the schedule? What are you talking about? What piece of paper? Let's see it.

The Court: Let's have your exhibit numbers now.

Mr. Corinblit: Yes, sir. The portion of Exhibit 46-A-1 referring to the six companies other than Loew's and Paramount covering the period from 1945 to 1949 only. I will be glad to offer those in evidence distributor by distributor.

The Court: You have got part of this exhibit in, haven't you?

Mr. Corinblit: Yes.

Mr. Mitchell: This goes back to 1940 now.

Mr. Corinblit: Yes. I am only offering—they are separated by years. I am only offering the portion of the exhibits from 1945 through 1949, to complete this picture.



(Testimony of George A. Hickey.)

Mr. Johnston: You should detach the earlier part.

Mr. Corinblit: Yes. It is a very simple matter, your Honor. We will detach the earlier section.

The Court: Well, if you will eliminate the ones before 1945, they may be admitted in evidence.

Mr. Corinblit: All right, your Honor. As the next exhibit in order, we will offer in evidence 46-A-12, a play-off [458] of Columbia pictures from 1945 to 1949.

The Court: It may be received in evidence.

The Clerk: 46-A-12.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 46-A-12.)

Mr. Corinblit: We will offer as Plaintiff's Exhibit 46-A-13 the play-off of RKO pictures on first run in Los Angeles from 1945 to 1949.

The Court: It may be admitted.

The Clerk: Exhibit 46-A-13.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 46-A-13.)

Mr. Corinblit: We will offer as Plaintiff's Exhibit 46-A-14 the play-off of Twentieth Century-Fox pictures on first run Los Angeles from 1945 to 1949.

The Court: It may be admitted.

The Clerk: 46-A-14.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 46-A-14.)

(Testimony of George A. Hickey.)

Mr. Corinblit: We will offer as Plaintiff's Exhibit 46-A-15 the play-off of United Artists pictures on first run from 1945 to 1949.

The Court: It may be admitted.

The Clerk: Exhibit 46-A-15. [459]

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 46-A-15.)

Mr. Corinblit: We will offer as Plaintiff's Exhibit 46-A-16 the play-off of Universal pictures first run in Los Angeles from 1945 to 1949.

The Court: It may be admitted.

The Clerk: Exhibit 46-A-16.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 46-A-16.)

Mr. Corinblit: We will offer as Plaintiff's Exhibit 46-A-17 the play-off of Warner pictures first run in Los Angeles from 1945 to 1949.

The Court: It may be admitted.

The Clerk: 46-A-17.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 46-A-17.)

Q. (By Mr. Corinblit): Now, Mr. Hickey, with respect to first run in Los Angeles——

The Court: Mr. Corinblit, keep up your voice. Mr. Hickey told you he can't hear very well.

Mr. Corinblit: I'm sorry.

Q. There was a time, was there not, Mr. Hickey, just prior to 1949 and during 1949 that Loew's was playing its pictures first run in three theatres, isn't

(Testimony of George A. Hickey.)

that correct? A. That is correct. [460]

Q. Those theatres were the Los Angeles, the Egyptian and the Wilshire Theatre on Wilshire Boulevard. A. That is correct.

Q. Subsequently, in 1950, Loew's shifted their product from three theatres to two theatres, which included the Loew's State Theatre downtown and the Egyptian Theatre on Hollywood Boulevard only, isn't that correct?

A. That is correct.

Q. Now, you discussed the shifting of Loew's pictures from three theatres to two theatres with Mr. Zabel of Fox West Coast, did you not?

A. That is correct, because the theatres belonged to the West Coast people and he worked for them.

Q. And they agreed with you that you should shift the product from three theatres, that is the Los Angeles, the Egyptian and the Wilshire, to the Loew's State and the Egyptian, isn't that correct?

Mr. Mitchell: Let's get a foundation laid for this conversation instead of the conclusion of an agreement. If there was a conversation with Mr. Zabel, it must have been on a date and in a place with somebody present, and not by a conclusion. I object to the question on the ground it calls for a conclusion. No foundation laid.

The Court: Lay the foundation.

Q. (By Mr. Corinblit): Mr. Hickey, about when did you [461] talk to Mr. Zabel, approximately what time?

A. I don't remember that, but I remember I

(Testimony of George A. Hickey.)

talked to him, and I remember I wanted to shift it. The reason I wanted to shift it was because during the war period there was a lot of soldiers and a lot of people on the streets and they were looking for entertainment. They would go into any theatre, and all theatres at that time were crowded. It was all right then to play three theatres, but when the war was over and they were taking the soldiers out of this town, there wasn't so much business and I was fighting three overheads, and large overheads, because the State and the Egyptian and the Fox Wilshire——

Q. The Los Angeles and Egyptian.

A. Well, the Los Angeles and the Egyptian and the Fox Wilshire, they were three large theatres and they all had large overheads, and I didn't want to fight large overheads in three theatres on poor business, so I thought it was good business for me to refuse to play theatres from that period on.

So I went to see Mr. Zabel and I talked to him about it, and I told him that he was not making and money and I was not making any money by fighting three overheads, and I would like to confine my pictures to two theatres and I would like to set them up as a showcase, one downtown and one in Hollywood, and then we could do proper advertising in those two [462] theatres and sell our pictures to the rest of the territory in those theatres.

Q. The two theatres you named were what?

A. Well, at that time—I don't remember dates



(Testimony of George A. Hickey.)

and I don't try to. I have so much to remember that I don't try to remember dates. It might have been the Los Angeles and the Egyptian, or it might have been the State and the Egyptian. I don't remember that.

Q. The only two theatres you played simultaneously with each other after the three theatres were the Loew's State and the Egyptian, isn't that right? A. That may be true. [463]

Q. Mr. Hickey, I will show you the play-off of Loew's pictures, Exhibit 46-A-4, and show you that prior to the picture Border Incident, November '49, the three-theatre group you referred to was Los Angeles, Egyptian and Wilshire, and after that date the two-theatre group is the Egyptian and the Loew's State, is that right?

A. Well, that could be right because I told you I didn't remember which theatre it was.

Q. Yes. So therefore the theatres that you talked about were the Loew's State and the Egyptian?

A. Yes.

Q. And Mr. Zabel agreed with you that it was all right to transfer the pictures from the three-theatre group, the Los Angeles, Wilshire and Egyptian, to the two-theatre group, the Loew's State and Egyptian?

Mr. Mitchell: Now, wait a minute. I object to that as argumentative. He is stating a conclusion.

If he wants what Mr. Zabel told him he should ask what Mr. Zabel told him and not give a conclusion.



(Testimony of George A. Hickey.)

There was not a transfer. There was a selling of pictures, first in three theatres and then they decided to sell to two theatres.

The Court: Objection sustained.

Mr. Corinblit: All right.

Q. (By Mr. Corinblit): What did Mr. Zabel say? [464]

A. Well, it wouldn't have made any difference to me.

Q. May I interrupt you, Mr. Hickey? I wonder if before you get into that you could just tell me, if you remember, what Mr. Zabel said.

A. Why, no, I don't remember what Mr. Zabel said.

The Court: Your attorney objected a moment ago and he wants you to give the testimony instead of any conclusion.

Do you remember what he said?

The Witness: I started to tell him but he stopped me.

I started to say that it wouldn't have made any difference whether Mr. Zabel agreed to it or not or whether he didn't agree to it.

I would have taken the pictures out of the Wilshire Theatre because they weren't profitable for us to run them there.

Mr. Corinblit: Your Honor, I move to strike the answer as non-responsive.

The Court: It may go out.

Q. (By Mr. Corinblit): Now, Mr. Hickey, just state what Mr. Zabel said as to whether he said,

(Testimony of George A. Hickey.)

"I agree," to that or not. Did he say that in substance or effect?

A. Well, I think he must have agreed to it.

Q. Now, Mr. Hickey, when in—I will withdraw that.

This discussion you had with Mr. Zabel was just prior to the transfer from the three theatres to the two-theatre group? [465]

Mr. Mitchell: I object to that on the ground it assumes a fact not in evidence, that there was ever any transfer. You don't transfer pictures. This is not a streetcar line. You sell pictures. First you sell three theatres and then you sell two. There isn't any transfer involved. And it assumes a fact not in evidence and is argumentative.

The Court: What do you call it, Mr. Hickey, when you change theatres? Was there a transfer?

The Witness: No, there was no transfer.

The Court: What do you call it?

The Witness: I call it a sale in an individual theatre. Now, we sold the pictures to the——

The Court: Well, you changed theatres. What did you call it when you changed theatres? What do you call it when you move a product from one theatre to another? Is that a transfer?

The Witness: No. We cancelled it in the Wilshire Theatre and we continued it in the other two theatres.

The Court: Well, I thought you changed from the Los Angeles to the RKO.

Mr. Corinblit: Loew's State.

(Testimony of George A. Hickey.)

The Court: Yes, Loew's State.

The Witness: No. As I remember it, we were running in the Loew's State at the time and we also run in the Wilshire and we run in the Egyptian at the same time, three theatres. [466]

The Court: You don't question the play-off, the play-off that has been introduced here?

The Witness: No, I don't question the play-off.

The Court: I think the play-off shows that you transferred from the Los Angeles Theatre——

The Witness: Oh, oh, well, I didn't understand what he was—I thought he was talking about a transfer from the Wilshire to Hollywood.

The Court: When you left the Los Angeles Theatre and went into another theatre what term do you use for that?

The Witness: Well, as I understand that, they lost their lease in the theatre and from that time on Loew's, as I remember it, took the theatre back because they owned the building and they owned the theatre.

The Court: Mr. Hickey, this is a very simple question.

You changed from one theatre to another. You changed from showing your pictures in one theatre to another. Now, what is the term for that change? Is there a transfer from one theatre to another theatre?

The Witness: No. We simply cancel the pictures in one theatre and we sell them to the other theatre. We don't call it a "transfer."

(Testimony of George A. Hickey.)

The Court: Do you have any term for that transaction?

The Witness: No, that is all we do.

The Court: You wouldn't call it a "transfer"?

The Witness: No.

The Court: All right.

Q. (By Mr. Corinblit): Now, Mr. Hickey, you knew when you were discussing with Mr. Zabel—withdraw that.

The Court: I didn't hear that.

Mr. Corinblit: I withdraw the question so it is not necessary.

The Witness: I didn't hear it either.

Mr. Corinblit: I withdrew the question.

Q. (By Mr. Corinblit): Now, just one other fact and perhaps this is a matter of stipulation.

The date upon which Fox no longer had an interest in the Loew's State Theatre is what date?

Mr. Johnston: Some time in November of 1949.

Mr. Corinblit: And thereafter either the Loew's Company for a short period of time or the United Artists Theatre Circuit, Inc., isn't that correct?

Mr. Johnston: That is not in accordance with my understanding when you put it "either."

After Fox was evicted from the Loew's State Theatre for a period of time Loew's operated the theatre themselves. Then subsequent to that United Artists Theatre Circuit operated the theatre but those precise dates I cannot give you because I don't know.

(Testimony of George A. Hickey.)

Mr. Corinblit: All right. I have no further questions of Mr. Hickey. [468]

Cross Examination

Q. (By Mr. Mitchell): Now, Mr. Hickey, you have been asked a great many questions about the first run play-off in Los Angeles between 1945 and 1949, but the period in question in this lawsuit has just been touched upon. We are going to talk about 1950 and 1951.

The theatres available to play major product first run Los Angeles downtown were the Loew's State, which you think is the best theatre——

A. Right.

Mr. Corinblit: Just a minute. Your Honor, I object to this. I think Mr. Hickey has testified he never tried to sell these theatres. They would hardly be available to him.

The Court: Overruled.

Q. (By Mr. Mitchell): Was the Los Angeles Theatre a showcase theatre in those two years?

A. The Los Angeles Theatre, yes.

Mr. Corinblit: Just a minute, your Honor. I am sorry. I wonder if we could have a definition of the term showcase.

The Court: Yes, let's get a definition.

Q. (By Mr. Mitchell): Tell the jury what a showcase theatre is, Mr. Hickey. [469]

A. I beg your pardon?

Q. Will you tell the jury what a showcase theatre is?



(Testimony of George A. Hickey.)

A. A showcase theatre is a theatre that is well equipped, well run, kept clean, and a theatre where you and your family would like to go, and a place where we would like to present our pictures to the public.

We don't like to go into theatres that are not well kept. We don't like to go into theatres that are not run properly and managed properly.

We like to go into a theatre that you would like to bring your family to and one where there is a manager there to take care of the people coming in and out.

Q. Does location have anything to do with a showcase?

Mr. Corinblit: Just a minute, your Honor.

The Witness: The location of the Loew's State Theatre downtown in my opinion——

Q. (By Mr. Mitchell): I am talking about the location of a theatre having anything to do with it being a showcase theatre. A. Oh, yes.

Q. Just talking about showcases generally. We will come to theatre by theatre in a moment.

A. The location of a theatre has a great deal to do with it being a showcase theatre.

Q. Explain that. [470]

A. Well, for instance, you take the Loew's State downtown. There are two theatres downtown that in my opinion are the two best theatres in the downtown district. One of them is the Loew's State Theatre and the other theatre is the Los Angeles Theatre.

(Testimony of George A. Hickey.)

Now, the Los Angeles Theatre is a nice theatre, but it is in the middle of a block, right off of Seventh.

The Loew's State Theatre is right on the corner of Seventh and Broadway, and it has got 400 more seats than the Los Angeles Theatre. That has a great deal to do with its being a first-class showcase.

So my preference in the City of Los Angeles downtown for a showcase theatre is the Loew's State Theatre, and that is where I always wanted to play my pictures. But when the theatre was leased and run by Fox, they naturally wanted the best theatre, too, so they put their pictures into the Loew's State Theatre. The building belonged to us, the theatre belonged to us, but they wanted the best theatre, so they put their pictures in there for a long, long time.

When they found out——

Q. The theatre was leased to Fox West Coast?

A. Yes, it was leased to Fox West Coast by our company. When they found out they were going to lose the lease on the Loew's State Theatre, a short time before that they started to run their pictures in the Los Angeles Theatre, to [471] build the Los Angeles Theatre up, if they could. So they run them there.

Then when they lost their lease, I was fighting for years to get our pictures into the Loew's State Theatre, and they would never put them in there, so I was forced to go into the Los Angeles Theatre,

(Testimony of George A. Hickey.)

but when they lost their lease, they had no room in the Los Angeles Theatre for our pictures, and we could easily get them in the Loew's State Theatre. So for a short period of time our company run the Loew's State Theatre.

And then I believe they leased the theatre to the United Artists Theatre Corporation. I believe that is true. I don't have anything to do with leasing the theatres. That is all handled in New York.

Q. What does the playing of a Loew's picture in what you consider the best theatre in town, downtown, the Loew's State, what does that do for Loew's pictures?

A. Well, I will tell you what it does for Loew's pictures. Do you want me to connect—I should connect two theatres in that statement.

Q. All right.

A. I think, if I might say so here, that the Chinese Theatre on Hollywood Boulevard is the best theatre on Hollywood Boulevard, and that is owned by the Fox corporation. I would like to get my pictures in the Chinese Theatre. But the [472] Chinese Theatre was closed to me because the Fox company run their own pictures in the Chinese Theatre.

The only theatres then open for me to run my pictures in in Hollywood was the Egyptian Theatre, which happened to be owned or run by the United Artists Corporation. It just so happens that both theatres then, the State downtown and the Egyptian

(Testimony of George A. Hickey.)

Theatre in Hollywood was run by the same corporation.

Now, the other theatre over in Hollywood that I would take would be the Paramount Theatre, but the Paramount Theatre was closed to me because they run the Paramount pictures. So I couldn't get in there.

The next theatre, which was a second, third or fourth rate house, was the Vogue Theatre, or the Iris Theatre or the Hollywood Theatre or the Hawaii Theatre.

I couldn't get the Pantages Theatre, which is on Hollywood Boulevard, because they run their own pictures, the RKO pictures. They run them in downtown RKO Theatre, and they run them in the Pantages Theatre in Hollywood.

So I chose to take the State downtown and the Egyptian Theatre in Hollywood.

Q. Now, Mr. Hickey, what I want you to tell me is what the playing of your pictures in two theatres like those would do for Loew's pictures.

A. If you will pardon me, I am going to tell you that, but I can't tell it all at once. [473]

Q. All right.

A. I will have to tell it my way.

For instance, we take a theatre downtown, the State, and the Egyptian Theatre in Hollywood. If we can play those theatres and play all of our pictures in those theatres, we can take and make those theatres very valuable for every theatre in the city of Los Angeles and in fact in the county.



(Testimony of George A. Hickey.)

And not only in the county but in adjacent cities to Los Angeles.

Q. (By Mr. Mitchell): What do you mean "make available to the other theatres in Los Angeles"?

A. Well, I am going to tell you that, too, if you let me. I am going into this thing and while I am on it, I am going to tell you just what is in my mind.

We have often taken pictures and put them in those two showcases and we have spent more money on advertising than we ever took out of both of them put together for film rental.

And the reason we do that is not so much to make any money on those two theatres, because generally speaking we lose money because our advertising is so big that we don't get enough film rental out of both of the theatres to make it worthwhile.

But why we use the theatres for a showcase is this. We go into the rest of the territory then with the pictures. [474] We go to our neighborhood, my neighborhood and your neighborhood and the other fellow's neighborhood and they all have nice theatres in these neighborhoods, and after you exploit them in the State and the Egyptian everybody knows it then because they are exploited well. We spend a lot of money. We spend as high as 40 and 50 thousand dollars advertising a picture in the city of Los Angeles.

Sometimes we don't get 40 or 50 thousand dol-



(Testimony of George A. Hickey.)

lars in the first two theatres that we use as showcases to pay that bill, but we do get it from the neighborhood houses and the adjacent cities to Los Angeles by doing that.

That is the reason we use the two showcases, two theatres.

Now, you take Guys and Dolls. We run Guys and Dolls in the Paramount Theatre in Hollywood. We run it for four months.

Q. (By Mr. Mitchell): That is since 1951? That is a recent picture?

A. Yes, that is a recent picture.

We spent—I have the story of that in my pocket if you will let me read it.

Q. We are interested in the period 1950 to 1951, Mr. Hickey. Let us stick to 1950.

A. You want to stick to that?

Q. That is the only period involved in this lawsuit in my opinion. [475]

A. I see. Well, we will stick to that and I don't know as I could say any more about that.

Q. You say you like to play in these two showcase theatres. Why don't you play day and date in theatres in Inglewood or Westchester or Pasadena?

A. Well, I will explain that to you.

Mr. Corinblit: Pardon me, Mr. Hickey. Is your question "Why you do it now"?

Mr. Mitchell: No, why didn't he do it then. I thought I just said we were talking about 1950 and 1951.

(Testimony of George A. Hickey.)

The Witness: I will tell you why we don't do it and why we didn't do it.

You have the two showcases. You have one downtown and one in Hollywood. Now, if I was to take and run other theatres in the various neighborhoods, the same picture day and date with downtown and Hollywood, there wouldn't be enough people come from each one of those areas to make any great difference to the theatre there.

In other words, if you had a theatre over here there wouldn't be enough people come from, we will say Westwood, to go to Hollywood to see the picture to hurt the Westwood theatre.

There would be only a certain percentage and I wouldn't want to say what percentage would come from there. It might be five per cent. It might be ten per cent. But there would [476] be a percentage of people that will not wait to see a good picture until it comes to their neighborhood. So they would, a certain percentage, would leave that area.

There would be another certain percentage leave another area. We will say Encino down in the Valley. There would be a certain percentage go into Hollywood and that would happen all over the city and in all the different areas and it wouldn't hurt any one of those areas or those theatres in those areas, because there wouldn't be enough people come from each area to make any difference to the theatre in that area.

But, if you would take and figure it all up it would probably run into 40 or 50 per cent of the

(Testimony of George A. Hickey.)

showcase business that would come from a lot of areas around Los Angeles, and if you take that away from your showcase in Hollywood and your showcase downtown, you would ruin their business and they wouldn't make any money and it wouldn't hurt the other fellow either.

So, why isn't it all right to have two showcases and advertise it so the theatres in the various areas will make money when they get the picture?

If we can spend 40 and 50 thousand dollars as we very often do, and we spent—I know we spent \$48,000 on *Guys and Dolls*—

Q. (By Mr. Mitchell): Let us stay with 1950 and '51. [477]

A. Pardon me. I—well, that goes for downtown Los Angeles, too.

You have all of the east side. You have got all of those—you have got Pasadena. It wouldn't take over twelve minutes to come in on the highway.

Q. Freeway.

A. Or speedway—freeway from Pasadena to Loew's State Theatre, because I have driven it and I didn't break any laws, either.

You can come in easy in 15 minutes.

Now, there is a certain number of people that will come from Pasadena to see the pictures in Loew's State Theatre but not enough to hurt any of the theatres in Pasadena. But if that amount—if that number of people come from all these theatres,—come from all of these various areas, I should say, around East Los Angeles and Whittier and out

(Testimony of George A. Hickey.)

that way, if you take that away from the Loew's State downtown, the Loew's State will lose money and we are spending 30 and 40 and 50 thousand dollars trying to advertise it, so when the pictures get to those areas it will be worth more money.

It has proven out that it is worth more.

In *Romeo and Juliet* we spent \$37,000 and we didn't do \$37,000 on the run of *Romeo and Juliet*, but we spent it.

But, the other theatres got the benefit of our advertising. [478]

Mr. Corinblit: May we have the date of *Romeo and Juliet*? What is the date on that, Mr. Hickey?

The Court: What was the date of the *Romeo and Juliet* picture?

The Witness: Well, that happened to be a way back, but I get enthused. I get enthused about it and I could tell you lots of things, lots of reasons why I do things and they would make sense. But it is hard for me—I am just like the—probably like a lot of other people. I jump the gauntlet, and I am sorry.

The Court: With that apology, I think we will take our morning recess.

Ladies and gentlemen of the jury, we are about to take another recess and it is my duty to admonish you that you are not to discuss this case among yourselves, you are not to permit anyone to discuss it with you and you are not to formulate or express any opinion until the case has been finally submitted to you.



(Testimony of George A. Hickey.)

With that admonition we will now recess until 15 minutes after 11:00 o'clock.

(Short recess.) [479]

The Court: Is it stipulated the jury is present and in the box?

Mr. Mitchell: So stipulated.

Mr. Corinblit: So stipulated.

Q. (By Mr. Mitchell): Mr. Hickey, you spoke about the number of dollars you spent on advertising pictures in the showcase theatres. Was there any other form of advertising that was accomplished by showcasing your pictures?

A. Any other form?

Q. I am speaking of word of mouth advertising.

A. Oh, yes.

Mr. Corinblit: Your Honor, I object to that as certainly leading and suggestive.

The Court: Overruled. You can answer.

The Witness: The reason that we advertise pictures is because if you have a good picture and you properly advertise it, the word of mouth will bring you business. If you have a bad one, why, you don't go so heavy on the advertising.

The Court: You shut people up, do you?

The Witness: That's right. So we do the best we can and we spend a lot of money with big pictures, because the word of mouth means a great deal, and that is the reason we advertise pictures and spend \$40,000 and \$42,000 on them. We know we are spending more than we are going to get out of [480] the rental in the showcases, but we



(Testimony of George A. Hickey.)

depend upon the outskirts and the cities adjacent.

We even go as far as Phoenix, Arizona, Tucson, Arizona, the papers from here go there. That is the reason we do great advertising, because we know if we played pictures in Tucson and Phoenix before we played them here, our grosses are very, very bad.

So we try to hold the pictures back until after they are released and advertised here in the two showcases, and then we release them there.

That is what word of mouth advertising does. If you go to see a good picture and you like it, you will tell others, and that is the reason for advertising, and that is the reason for using two showcases.

Q. (By Mr. Mitchell): You also hold your pictures back in Los Angeles metropolitan area until after the two showcases have accomplished this purpose?

A. Oh, yes, because the word of mouth in the showcases, your first runs, your advertising, when the pictures go out into the neighborhoods and into the towns adjacent to the city, they are worth a great deal more then to us and to the theatres than they are before.

Q. Now, Mr. Hickey, using your idea of showcase, which you have explained to us now for 15 minutes or so, do you consider the Loew's State Theatre a showcase theatre? [481]

A. I consider the Loew's State Theatre downtown the best showcase theatre in the city of Los Angeles.

(Testimony of George A. Hickey.)

Q. How about the Los Angeles?

A. I would consider that a fairly good theatre, but I would prefer and feel that the Loew's State is the finest showcase downtown. [482]

Q. Well, is the Los Angeles what you would call a showcase theatre? A. Yes.

Q. Is the RKO Theatre downtown, the RKO Hill Street, at 8th and Hill, a showcase theatre?

A. It is a nice theatre but I wouldn't say it was a showcase theatre.

Q. Is the Warner Theatre at 7th and Hill a showcase theatre?

A. No, it isn't. I wouldn't say it was a showcase theatre because there has been several visits I made to the Warner Theatre.

That theatre didn't impress me any great deal. It didn't impress me at all.

Q. How about the Paramount Theatre with the 3000 seats at 6th and Hill?

A. The Paramount Theatre is a nice theatre, but for a showcase I would say no, because the location is bad.

Q. Not a good showcase for your pictures?

A. Not a good showcase for our pictures, no.

Q. Paramount shows its pictures there?

A. Yes. It is a nice theatre.

Q. How about the Orpheum?

A. Huh. The Orpheum Theatre in my opinion is a third or fourth rate theatre. Today they will run a show in there [483] and next week they will

(Testimony of George A. Hickey.)

be running vaudeville, and the following week they will run a picture.

Q. How about the United Artists Theatre over on Broadway near 10th, I guess it is?

A. No, that isn't a showcase. It isn't a good location. It is a nice theatre, but if that was in a neighborhood it would be a swell theatre for a neighborhood, but it is a bad location.

Q. All right. Now, in 1950 and 1951 the Loew's State was operated by United Artists Theatre Circuit? A. I believe so, yes.

Q. And the Los Angeles Theatre at that time was operated by Fox West Coast?

A. That is correct.

Q. And the RKO Theatre was operated by the RKO Theatre Company? A. That is correct.

Q. And the Warner Theatre was operated by Warner Bros.? A. Correct.

Q. And the Paramount Theatre put its pictures in the Paramount which was operated by Fanchon & Marco? A. That is correct.

Q. And the Orpheum was operated by a man named Corwin?

A. Sherrill Corwin, yes. [484]

Q. And the United Artists was also—excuse me. And the United Artists was also operated by United Artists Theatre Circuit?

A. That is correct.

Q. And it played Universal pictures principally?

A. Well, to be honest with you, I don't know.

(Testimony of George A. Hickey.)

I imagine they played some of the small company pictures.

Q. All right. Now, I would like to take Plaintiff's Exhibit 46-A-4 up with you, Mr. Hickey.

This is the Loew's play-off in 1949 and 1950 and during the early part of 1949 it shows that all of your pictures were playing in the Los Angeles, Wilshire and Egyptian. Is that right?

A. That is correct.

Q. Until we get down to July 1st, and then this shows the picture Edward, My Son playing in the Four Star.

Tell me about the Four Star Theatre and why you played Edward, My Son in the Four Star Theatre. You played it all alone there, isn't that right?

A. That is right.

Q. Now, tell me why.

A. Well, once in a while we have a problem child and when we have a problem with a picture we put it in a theatre like the Four Star and advertise it and try to build it up.

The Four Star Theatre has a very small overhead. It [485] doesn't cost much to run it and we generally run it for eight or ten weeks and in that way we get a fairly good rental.

But if we should put that into a showcase we couldn't spend the money on it that would do it any good.

It just wouldn't go in a showcase. So, we have to pick certain pictures that are problems, and we have to put them in a theatre like the Four Star.

(Testimony of George A. Hickey.)

Q. Well, what made—what do you mean by “a problem picture” in respect to *Edward, My Son*?

A. Well, it is more or less of an arty picture. You know, more or less an art picture.

Art Pictures will go in the Four Star when they wouldn't go in any other theatre.

Q. All right. Then except for the playing of *Edward, My Son* down through October, you continued to play your pictures in the Los Angeles, Egyptian and Wilshire Theatres, right?

A. Yes.

Q. Then on October 10th, you made a picture called *Intruder in the Dust*, alone at the Four Star?

A. Yes.

Q. An exclusive run? A. Yes.

Q. Why did you play *Intruder in the Dust* at the Four Star? [486]

A. Well, that is another problem picture that we have got to get a long run on and the Four Star was suited for that kind of a picture. They have that kind of patronage there. [487]

Q. All right. Then commencing in January 1950, you played your pictures for a period of time in the Loew's State and the Egyptian, right?

A. That is correct.

Q. And those were then operated, you have testified, by United Artists? A. That's right.

Q. United Artists Theatres Circuit?

A. Yes.

Q. You continued that until June 20, 1950, and then I see the picture *Asphalt Jungle* playing in



(Testimony of George A. Hickey.)

the Orpheum and the Hawaii. How did you happen to play Asphalt Jungle in the Orpheum and Hawaii?

A. Well, in the Orpheum and Hawaii, the reason the pictures were played there was this. For months Mr. Corwin and Mr. Rosenberg, who run that theatre at the time——

Q. The Orpheum?

A. The Orpheum, were asking me for pictures, and so I told them that we would be glad to give them pictures, but they would have to bid for them. So they finally did bid for them.

Q. Bid against United Artists Theatre Circuit?

A. They bid against the United Artists Theatres. If I remember correctly, the United Artists got pretty mad about it and they told me that it was their understanding that they were [488] to get Loew's Incorporated or get Metro-Goldwyn-Mayer pictures, and I said, "There is no such understanding and you can't have them unless you bid for them the same as the Orpheum."

I believe at that time they closed their theatre for a period of 30 days because I wouldn't agree to give them the pictures.

I said, "The pictures of ours can be run in any theatre that wants them and any theatre that will bid for them, and any theatre that will pay me the proper terms can get them."

Finally they opened up their theatre and they bid for them against the Orpheum Theatre.

(Testimony of George A. Hickey.)

Q. Not against the Orpheum, you don't mean. Against the Loew's State?

A. Well, I mean the Loew's State bid and the Orpheum——

Q. Loew's State bid against the Orpheum?

A. That's right, and the Orpheum bid against Loew's State. I am positive and quite sure at this time that the Orpheum received at least 40 per cent of their playing time from—beginning, I believe, 1950 to 1951, they have gotten a lot of our pictures, and at least 40 per cent of their playing time during that period was our pictures.

Q. All right. Now, according to this record, the first one, Asphalt Jungle, in June 1950, that played the Orpheum and Hawaii. [489]

A. That's right.

Q. How did you happen to play the Hawaii Theatre? That is on Hollywood Boulevard, isn't it?

A. That's right. Well, the Hawaii Theatre played it because we didn't get a better bid in Hollywood. They had the best bid.

Q. The next picture that started June 4th, Crisis, that played what theatres?

A. That played Loew's State and the Egyptian.

Q. On the bid? A. Yes.

Q. And the next picture is Father of the Bride. Was that a good picture?

A. That was a good picture. That is one of the best pictures we made during that period.

Q. Where did that play?

A. That played in the Orpheum and the Hawaii.

(Testimony of George A. Hickey.)

Q. Did they bid for that picture? A. Yes.

Q. And won it on a bid?

A. Yes. Loew's State bid and the Orpheum bid.

Q. And the Orpheum won?

A. And the Orpheum won.

Q. The next picture, July 14th, Happy Years, where did that play? [490]

A. State and Egyptian.

Q. The next picture, July 15, Life of Her Own, where did that play?

A. That played Loew's State and the Egyptian.

Q. The next picture, Three Little Words, where did that play?

A. Played the Loew's State and the Egyptian.

Q. The next picture, Skipper Surprised His Wife, where did that play?

A. Orpheum and Hawaii.

Q. The next picture, Mystery Street, where did that play?

A. That played at the Orpheum and Hawaii.

Q. And the next picture, Duchess of Idaho, where did that play?

A. That played in the Orpheum and Hawaii.

Q. The next picture, Summer Stock, where did that play?

A. That played Loew's State and the Egyptian.

Q. The next picture, Stars in Her Crown—is that it? A. Yes, Stars in Her Crown.

Q. Where did that play?

A. Orpheum and Hawaii.

(Testimony of George A. Hickey.)

Q. The next picture is *The Next Voice You Hear*. Where did that play?

A. That played at the Four Star. [491]

Q. How did that happen to play at the Four Star?

A. That played at the Four Star because it was one of those problem pictures that lent itself to that kind of a run, so we run that in the Four Star. I am not positive about this, but I would say that was about eight weeks.

The Court: Was the picture given to the Four Star on bid or did you put it over there designedly because it was a problem picture?

The Witness: We have everybody bid on every picture in the city of Los Angeles.

Q. (By Mr. Mitchell): At least during 1950.

A. Yes.

The Court: And the Four Star outbid—

The Witness: Four Star outbid, because nobody else wanted it. It was one of them problem things.

The Court: You recognize a problem when you see one, do you?

The Witness: Yes, sir.

Q. (By Mr. Mitchell): The next picture—now we are up into September—the next picture is *Lady With a Passport*.

A. *Lady With a Passport*. That played at the Orpheum and the Hawaii.

Q. The next picture is *Toast of New Orleans*.

A. *Toast of New Orleans*, that played Loew's State and the Egyptian. [492]

(Testimony of George A. Hickey.)

Q. The next picture is Devil's Doorway.

A. That played in the Orpheum and Hawaii.

Q. The next picture is To Please a Lady.

A. That played the State and Egyptian.

Q. The next picture is The Miniver Story.

A. That played the State and Egyptian.

Q. Right Cross. A. Orpheum and Hawaii.

Q. The next picture is Dial 1119.

A. Orpheum and Hawaii.

Q. King Solomon's Mines?

A. State and the Egyptian.

Q. Two Weeks With Love.

A. That played the Loew's State and Egyptian.

Q. The next one is Magnificent Yankee.

A. Four Star.

Q. How did that happen to play in the Four Star?

A. Another problem. We don't have them very often, but they do happen.

Mr. Corinblit: May I ask, was that on a bid?

The Witness: I beg your pardon?

Mr. Corinblit: Was that on a bid?

The Witness: Yes. Everything, it is my understanding that we bid on everything. If we have a picture going in any theatre, we either send out letters or we call [493] them on the phone and we ask them if they are interested in such-and-such a picture and they will say yes or no, and if they are going to bid on it, they will send the bid in, and if they are not going to bid on it, they will say, "No, we are not interested." [494]



(Testimony of George A. Hickey.)

Q. (By Mr. Mitchell): This Magnificent Yankee was the picture on the life of Oliver Wendell Holmes, Justice Holmes?

A. Yes, that is the picture that——

Q. Lawyers Are Problems or Judges Are Problems?

A. The masses are not interested in it.

Q. The next picture is Pagan Love Song.

A. That played Loew's State and the Egyptian.

Q. All right. Now we are up to January 1951 and the first picture of that year, Mr. O'Malley and Mrs. Malone, where did that play?

A. Orpheum and Hawaiian.

Q. The next picture, Ground for Marriage?

A. Loew's State and Egyptian.

Q. The next picture is Kim.

A. Loew's State and the Egyptian.

Q. The next picture is Watch the Birdie.

A. Orpheum and Hawaiian.

Q. The next picture is Cause for Alarm.

A. Loew's State and Egyptian.

Q. The next picture is Mutiny on the Bounty.

A. Orpheum and Hawaiian. The Orpheum played that and——

Q. Was that a reissue at that time?

A. Yes, it was a reissue and they played that with [495] Day at the Races and I believe, I am not positive about that, but I believe that they both played together, but I am not sure. They might have. One of them might have played it in the Hawaiian and the other might have played it in

(Testimony of George A. Hickey.)

the Orpheum, but the two pictures were played in either one of those theatres.

Q. Was Day at the Races also a reissue?

A. Yes.

Q. The next picture is Three Guys Named Mike.

A. Loew's State and the Egyptian.

Q. The next picture is Inside Straight.

A. Loew's State and the Egyptian.

Q. The next picture is Vengeance Valley.

A. Hawaii and Orpheum.

Q. The next picture is Royal Wedding.

A. Loew's State and Egyptian.

Q. The next picture is Father's Little Dividend.

A. Loew's State and the Egyptian.

Q. The next picture is Painted Hills.

A. That played in the Loew's State.

Q. The next picture is Soldiers Three.

A. Egyptian.

Q. Alone. Is that another one of those reissue things?

A. Now, the same thing might apply to that too, because I am not sure whether they played together or not. [496]

They might have played together because I am not positive about that, but they played in those theatres. Painted Hills played in the State and Soldiers Three played in the Egyptian.

Now, it might have been that we sold the State one of them as a second feature and we sold the Egyptian the other as a second feature, but I

(Testimony of George A. Hickey.)

wouldn't know that without looking up our records in our office.

Q. Now, we are up to April 1951 and from that time on until through September 1951 the record here shows that your pictures played in the——

A. State and Egyptian.

Q. State and Egyptian. Can you explain why we don't find any more Orpheum and Hawaii in that late period of 1951?

A. Yes. The Hawaii—the Orpheum never had a policy. They never had a set policy in their theatre. They would try pictures for a while. And then they would try vaudeville for a while and then they would try shows for a while. You never knew when you went to the Orpheum what you were going to see unless you read it in the papers before you went there.

They never had a set policy at any time and they tried everything and nothing seemed to be successful. So, from that period on they stopped bidding. They didn't bid any more. And they never asked for any more of our pictures.

But we would send the bids out and we do to this day.

Q. Let us stick with 1951. [497]

A. All right. We sent bids out throughout all that period and they never bid on them.

Q. After the spring of 1951?

A. That is true.

Q. All right. Now, with respect to these suburban theatres in these suburban cities such as

(Testimony of George A. Hickey.)

Inglewood and the Westwood area, Burbank, Glendale, Pasadena, Belvedere Gardens, Huntington Park—do you consider the theatres in those areas in substantial competition with the Hollywood and downtown Los Angeles first run?

A. Well,—

The Court: You can answer that question yes or no and then you may explain your answer.

The Witness: I would like to have you ask me that again, if you will, please.

Mr. Mitchell: Will you read it, Mr. Reporter?  
(Question read.)

Q. (By Mr. Mitchell): I mean on first run. If they were playing first runs would they be in substantial competition with the downtown and Hollywood theatre? A. (No answer.)

Q. Do you understand my question?

A. I do, yes, but they would be in a way substantial competition.

Q. Explain that. [498]

A. You see, there is a certain number of people, as I said before, there is a certain number of people come from these various areas and some of them would go downtown and some of them would go to Hollywood.

Now, if you take away, as I said before and I am repeating myself now, if you take away that amount of money from your showcase run you are just going to put the showcase theatre in the red. We are not going to get any money out of it. And the areas from which they come there is not enough

(Testimony of George A. Hickey.)

people to leave those areas to make any difference in the grosses when the picture gets to those areas.

Q. You were asked whether during the period—I am not sure whether we ever got up to 1950 and '51, but I will ask you if you can explain why, during 1950 and '51 you didn't sell any pictures first run Los Angeles to Fox West Coast.

A. (No answer.)

Q. To the Los Angeles Theatre?

A. Well, you can't sell a picture that has got plenty of—you can't sell a theatre that has got plenty of pictures. They run their own products so if they are all—if their dates are all filled up and they run their own pictures you can't get in there.

Q. And did Fox West Coast have any other theatre in Los Angeles suitable for Los Angeles first run except the Los Angeles Theatre during—

A. Yes.

Q. During 1950 and '51?

A. Yes. They have a beautiful theatre in Hollywood.

Q. I mean downtown Los Angeles.

A. No. The Chinese,—no, no, no, the only theatre downtown Los Angeles, that is in my opinion a showcase, would be the Los Angeles Theatre. That, of course, is outside of the State—the State in my opinion is the best theatre. They have the best location and have more seats by about 400.

Q. Let us direct your attention, Mr. Hickey, to 1950 and '51 to the first subsequent run, the 7-day



(Testimony of George A. Hickey.)

run in the Inglewood or, we will call it the Inglewood-Westchester area. You understand where I am talking about? A. Yes.

Q. How did you license your pictures on that run in that area?

A. Well, we gave Inglewood 7 days after downtown.

Q. And how did you offer your pictures in that Inglewood area?

A. How did we offer them? They bid for them there.

Q. What are the mechanics that you go through?

A. We just told them they would have to bid in order to get the pictures and they just bid.

The Court: What do you mean? Do you mean you told them that they had to bid? Did you send them a notice? [500]

A. Yes, we notified them that they would have to bid for the pictures. [501]

The Court: Did you have a form of notice that you sent out to each one of these theatres soliciting bids?

The Witness: You see, we don't bid, your Honor, unless somebody asks us to bid in the town. Now, we were playing our pictures in the Academy Theatre in Inglewood and there was some other exhibitor wanted our pictures. Well, the Academy Theatre in Inglewood had been running our pictures for a long, long time, so we said, "All right, if you want our pictures you will have to bid for them."

They said, "All right, we will bid for them."

(Testimony of George A. Hickey.)

So we notified West Coast that they would have to bid, too, so that is how bidding starts.

The Court: Then the only two houses bidding against each other were those. You didn't send out your notice of bids to all the other houses?

The Witness: Yes, everybody in the city then can bid, anybody can bid. When we establish bidding in a city, everybody and anybody in that city can bid.

The Court: When did you establish bidding in Inglewood?

The Witness: Well, your Honor, I couldn't remember those dates, but it has been quite some time.

The Court: With reference to the years 1949, 1950 and 1951.

The Witness: We start bidding in Inglewood——

Mr. Mitchell: Perhaps I can help him out with the date.

Q. If I tell you that the La Tijera Theatre adjoining Inglewood opened its doors in early 1949, that is Bill Kupper's theatre, would that help you fix the date when you started bidding?

A. Yes. He asked us. I think he was the first one that asked us to bid. He wanted to bid on the pictures, he wanted Metro-Goldwyn-Mayer pictures, so that is when the bidding started. I recall that now.

The Court: Up to that time you had been exclusively in one theatre.

The Witness: That's right.

(Testimony of George A. Hickey.)

Q. (By Mr. Mitchell): All right. Now, when you established bidding at the request of Mr. Kupper in the La Tijera Theatre just down the street from the Paradise—is that right?

A. That's right.

Q. Well, there wasn't any Paradise in those days.

The Court: Mr. Mitchell, what do you mean by down the street? Was it a block, half a block, or a half a mile?

Mr. Mitchell: Have we got those mileages yet?

Mr. Westbrook: No.

The Witness: There was no Paradise Theatre at that time. [503]

Mr. Corinblit: It is close to three miles.

Mr. Westbrook: What mileage is that you say?

Mr. Mitchell: No, it isn't close to three miles from the La Tijera to the Paradise Theatre.

Mr. Westbrook: It is 1.9, I think, or 2.1.

Mr. Corinblit: We are not sure of it either. We will check that, though.

The Court: Mr. Mitchell, I objected to your saying down the street.

Mr. Corinblit: Now it is down the miles, your Honor.

Mr. Mitchell: Maybe we can get a yardstick here and figure it out right now.

The Court: Down the street was miles, then. It wasn't feet.

Mr. Mitchell: No, it wasn't feet. According to

(Testimony of George A. Hickey.)

the legend, the scale on the map, it is less than two miles.

The Court: That is what you meant by down the street?

Mr. Mitchell: That's right.

The Court: All right, just so we understand.

Q. (By Mr. Mitchell): The La Tijera asked you to bid and there wasn't any Paradise Theatre at that time. Do you remember other theatres that you invited to bid? [504]

A. Yes. There was the Fifth Avenue. There was the Academy, the Fifth Avenue, the Egyptian.

Q. Not the Egyptian.

A. The United Artists. Pardon me.

Q. How about the Fox Inglewood?

A. Fox Inglewood, yes.

Q. Did you accomplish this invitation, as Judge Westover asked you, by telephone or by letter?

A. Well, that is something I couldn't answer, because I tell the manager what to do in that case and he handles that.

Q. Now, the Paradise came into existence in August 1950. Did you invite the Paradise to bid in this bidding situation? A. Yes.

Q. And did they actually bid?

A. They bid on—I don't know—two or three pictures. I don't remember at this time whether they got any or not. I have an idea they got two, but I am not positive about that.

The Court: Mr. Hickey—just a minute, Mr. Mitchell—let me be sure we understand. I think

(Testimony of George A. Hickey.)

I understand, but let me be sure. Bidding was started before the Paradise Theatre was built?

The Witness: That is correct. [505]

The Court: After the Paradise Theatre was built, then you offered pictures on a bid exactly the same as you did with these other theatres?

The Witness: That's right. That is correct.

The Court: But bidding in this area had actually started before the Paradise Theatre was built.

The Witness: The Paradise Theatre asked us, they asked me for a seven day run and I refused to give it to them. The reason I refused to give it to them is because, as I stated a little while ago, we have no seven day run in the city of Los Angeles and we use these two showcases to exploit our pictures so they will be well received and well patronized, when they get into those neighborhoods.

The Paradise Theatre is very close to a great many of these theatres in Inglewood. They are substantially competitive to the theatres that were bidding in Inglewood.

So I said, "All right, I will make an exception with you and I will let you bid for them if you want to, but we cannot grant you a seven day run," because if I granted them a seven day run, then the Valley would want a seven day run, say the Encino Theatre in the Valley would want a seven day run, and the Picewood would want a seven day run in Los Angeles, the Meralta Theatre in Culver City would want a seven day run. All these theatres



(Testimony of George A. Hickey.)

in these various areas around here would want a seven day run. [506]

If I gave it to him, what reason and excuse would I have not to grant the same privilege to everybody else? It would upset our plan and cause us a great deal of lost revenue in this city, and I couldn't do it.

The Court: Mr. Hickey, do I understand the Paradise wanted a seven day run without bidding?

The Witness: Yes.

The Court: They asked for a seven day run?

The Witness: They asked for a seven day run without bidding.

The Court: Without bidding?

The Witness: And then we told them we would let them bid for the seven day run against Inglewood.

The Court: At this particular time in that area was there any theatre that had a seven day run without bidding?

The Witness: No, sir, not ours. We had no seven day runs in the city of Los Angeles.

The Court: Without bidding.

The Witness: With or without bidding.

The Court: What was the run in Inglewood?

The Witness: Inglewood, we don't consider Inglewood Los Angeles. That was a seven day run in the city of Inglewood.

Mr. Mitchell: I think I can show you what he is saying to you. [507]

Q. Westchester is a part of the city of Los

(Testimony of George A. Hickey.)

Angeles technically, is that what you are saying? You are saying the Paradise is in the city of Los Angeles?

A. Yes, the Paradise is in the city of Los Angeles.

Q. Adjoining the city of Inglewood.

A. That is correct.

Q. And from a legal standpoint the Paradise Theatre is in the city of Los Angeles?

A. That's right.

Mr. Corinblit: Just a minute. We have gone through a long discussion here, which I think has been very interesting, but Mr. Mitchell is now asking Mr. Hickey to answer a question upon a legal point.

Mr. Mitchell: I think the court will take judicial notice.

The Court: I want to know this for my information and for the jury's information, because I understood Inglewood was seven days after Los Angeles, and now evidently the Paradise is seven days after Inglewood.

Mr. Mitchell: Then you do misunderstand, your Honor.

Mr. Corinblit: We will stipulate that the Westchester area as a technical matter and legal matter is considered part of Los Angeles. [508]

Mr. Mitchell: Not only considered a part but it is in the city.

Mr. Corinblit: There is no question about that.

(Testimony of George A. Hickey.)

And Inglewood as a legal matter is a separate community.

Mr. Mitchell: That is right. Now, your Honor——

The Court: Just a minute. Then you considered the Paradise Theatre as a theatre in Los Angeles and not a theatre in the Inglewood area?

The Witness: That is right. It is in the Inglewood area—it isn't in the Inglewood area the way we got it charted out. It is in the City of Los Angeles but you might say that all of those theatres over there are in the Inglewood area, but once we cross the line and give the Paradise Theatre a 7-day run then there is no reason why I can't give every theatre in Los Angeles that would ask me for a 7-day run and it would upset and cost our company a lot of money.

Q. (By Mr. Mitchell): Well, now, Judge Westover asked you a question as to whether you gave the Paradise an opportunity to bid for a 7-day run.

A. Yes, we did.

The Court: On the same terms as you did the theatres in the Inglewood area?

The Witness: That is correct.

Mr. Corinblit: With Inglewood?

The Witness: With Inglewood. [509]

Mr. Corinblit: Against Inglewood?

The Witness: Against Inglewood.

Q. (By Mr. Mitchell): The La Tijera Theatre also is in the city of Los Angeles, and adjoining Inglewood? A. Yes, sir.

(Testimony of George A. Hickey.)

Q. And did you give the Paradise an opportunity to bid against the La Tijera?

A. Yes. Well, the La Tijera wasn't—I don't believe the Paradise was there at that time.

Q. No, no, but the La Tijera was there in 1950?

A. That is right.

Q. And '51? A. That is right.

Q. And did you give both the La Tijera and the Paradise a chance to bid for the same run?

A. Yes. We gave them both—we gave both theatres a chance to bid for the same run.

Q. Along with the Academy?

A. That is right.

Q. And United Artists in Inglewood?

A. Yes, and Fifth Avenue.

Q. Fifth Avenue in Inglewood?

A. That is right.

Q. And the Fox Inglewood in Inglewood?

A. Yes, because they are in the general area.

Q. Do you think they are competitive with each other?

A. Yes, substantially competitive to each other.

Mr. Corinblit: Your Honor, I object to that question.

Mr. Hickey stated that the reasons for the refusal as to the Paradise was because the Paradise is in Los Angeles and the Inglewood theatres are in Inglewood.

The Court: I don't know whether he testified to that or not. You may have thought he so testified.

Q. (By Mr. Mitchell): Why did you require

(Testimony of George A. Hickey.)

the Paradise to bid against these theatres, the La Tijera, the United Artists in Inglewood, the Fox in Inglewood, the Fifth Avenue?

A. Because they are all in the same area.

Q. The Academy?

A. They are all in the same area and substantially competitive to each other.

Q. What do you mean by that, "substantially competitive"?

A. I mean the farthest one away is four miles. Even the Loyola is in this.

Q. We don't need to worry about the Loyola. It is playing Fox first run. But why do you consider these other theatres substantially competitive with the Paradise?

A. Because they are all right there in the same area, three and four miles apart. Some of them two miles.

Q. What difference does that make in respect to patronage? [511]

A. It makes a lot of difference. If they will go to the better theatre—people in that area will go to the better theatre, the theatre that they like the best. For instance, we will take the Academy or the—any theatres over there.

They are so close together that the business will be divided up so that nobody will make any money.

Q. You mean if you play them all day and date? A. Yes.

Q. What do you think would happen if you



(Testimony of George A. Hickey.)

would play the La Tijera and the Paradise day and date?

A. I don't think either one of them would do sufficient business to make any money.

Q. You think they would draw off from the same area? A. Yes.

Q. What would happen if they would play your pictures day and date in the Paradise and the United Artists in Inglewood?

A. I don't think that either one of them would make any money either.

Q. Why not?

A. Well, because they are too competitive. They are in the same area and you can't run in an area like that pictures and hope to be successful. [512]

There are a lot of these fellows that ask for runs that it is murder for them. It is just terrible for them. They don't seem to realize how much money they will lose when they ask for it. But we have to—it is my job and my duty to protect the revenue of my company. I am responsible for that. And I can't do anything that is going to hurt us.

And I know when you, in a small area like that, where the theatres are all the way from two to four miles apart, and you let them run together——

Q. You mean day and date?

A. Day and date, yes. Why, it is just out of the question for them to make any money.

Q. Why do you require the Paradise to bid against the Academy?

(Testimony of George A. Hickey.)

A. Because only one of them can get it. If the Academy——

Q. Why don't you——

A. He asks for it so we let him have it.

Q. Why don't you give pictures day and date to the Academy and the Paradise?

A. Because neither one of them would make any money.

Q. Why not?

A. Because they are too close together.

Q. What effect does that have? [513]

A. Well, it would split up the business. When you split up your business, why, it is going to affect your revenue.

Q. Do you think they draw patrons from the same area? A. Certainly.

Q. Do you think people from Westchester, so-called, go to the Academy? A. I do.

Q. Do you think people from over in the area of the Academy go to the Paradise? A. Yes.

Q. Do you want to stop at this point, your Honor?

The Court: Yes, but I would like to ask the witness a question.

From something you said a little while ago I got the impression that people went to the theatre—they didn't go to the theatre to see the theatre, but they go to see the picture, don't they?

The Witness: Well, it all depends. A great many times if I want to see a picture I will pick out the best theatre to see it in.

(Testimony of George A. Hickey.)

Now, if I wanted to see a picture in Hollywood and it was playing at the Chinese Theatre, I would go to the Chinese Theatre.

The Court: I know, but supposing you have a first run [514] house and a second run house. The second run house has a first run picture. People would go to see the first rate picture, wouldn't they?

The Witness: Well, they might, or they might wait until it got into some other theatre where they would rather go to see it there.

The Court: Take down in Inglewood.

The Witness: Yes.

The Court: What is the poorest house you have in Inglewood in your opinion?

The Witness: Well, I wouldn't want to say.

The Court: All right. If you played Oklahoma in the poorest house in Inglewood the people would go to see the picture Oklahoma, wouldn't they? They wouldn't make any difference about the house.

The Witness: Well, I don't know whether they would or not. A lot of theatres—there are a lot of theatres that people wouldn't go into because they are not well kept, they are not well run.

The Court: All right. Then it is your opinion that the theatre, that is, the kind of building, the kind of equipment they have is what draws or helps to draw people into the theatre?

The Witness: No, it don't help—it helps a little, yes.

The picture has a great deal to do with it. I will agree [515] with you there, but if I wanted to see a

(Testimony of George A. Hickey.)

picture I wouldn't go into the Orpheum to see it. I would drive—if I lived in Whittier—

The Court: Even if it is *Guys and Dolls*?

The Witness: No, not *Guys and Dolls*.

The Court: Suppose it was the only place it played in Los Angeles, you wouldn't go to see it?

The Witness: I probably would if it was the only place that played it, but if I had my choice—now, you take if a picture—if *Guys and Dolls* was running in the Orpheum Theatre downtown and I lived in Whittier, and I give you my word I would drive from Whittier to see it if it was playing in the Chinese Theatre or the Egyptian Theatre or the Paramount Theatre in Hollywood. I give you my word I would drive there to see it. I wouldn't go to the Orpheum.

The Court: All right. I just wanted to know what your point of view was.

Ladies and gentlemen of the jury, again we are about to take another recess, and it is my duty to admonish you that you are not to discuss this case among yourselves, you are not to permit anyone to discuss it with you and you are not to formulate or express any opinion as to the rights of the parties until the case has been finally submitted to you.

With that admonition we will now recess until 2:00 [516] o'clock p.m. this afternoon.

(Whereupon at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [517]

Friday, July 13, 1956, 2:00 p.m.

The Court: Is it stipulated the jury is present in the box?

Mr. Corinblit: So stipulated.

Mr. Mitchell: So stipulated.

### GEORGE A. HICKEY

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows:

#### Cross Examination—(Continued)

Q. (By Mr. Mitchell): Mr. Hickey, I will show you here a compilation taken from the bidding records of Loew's Incorporated which are here in court and ask you if this correctly shows the theatres from which bids were asked or requested, the theatres which submitted bids, and the theatres to which the pictures were awarded in the Inglewood-Westchester area from May 1, 1950, to September 18, 1951.

Mr. Corinblit: Just a minute, please. Your Honor, prior to that question there are two matters, but first I wonder if I could take Mr. Hickey on voir dire with respect to this document, please.

The Court: All right. [518]

Mr. Corinblit: Thank you.

#### Voir Dire Examination

Q. (By Mr. Corinblit): Mr. Hickey, have you seen this record before? A. Yes.

Q. Did you prepare it?



(Testimony of George A. Hickey.)

A. I had it prepared. I mean it was prepared in our office.

Q. Who was the person who prepared it?

A. I believe Mr. Aspell.

The Court: Will you speak up so we can all hear you, please?

The Witness: I believe it was Mr. Aspell.

Q. (By Mr. Corinblit): You are not sure?

A. No, but he is the one who would prepare it.

Q. You don't know whether he did or not?

A. Yes, he must have prepared it.

Mr. Corinblit: I will move to strike the answer.

The Witness: Yes, he prepared it.

Q. (By Mr. Corinblit): He is the one who examined the records on which this document is based, is that correct? A. Yes.

Q. All right.

A. He and Mr. Urschel. [519]

Q. He and Mr. Urschel? A. Yes.

Mr. Corinblit: All right. Fine. Thank you.

#### Cross Examination—(Continued)

Q. (By Mr. Mitchell): Now, does that correctly show what I have stated?

Mr. Corinblit: Your Honor, I object to the question as the witness has indicated this was prepared by some third party. The main reason for my objection, your Honor, is this. This is beyond the scope of the direct. Mr. Mitchell is now in the process of putting in part of the defendants' case. I ordinarily would have no objection if we had gone into the

(Testimony of George A. Hickey.)

matter, but we have not gone into these things, and I would like the matter to come in in a coherent way and then have the cross examination based on that, rather than the defense putting in their case at this time, including their exhibits.

Mr. Mitchell: I am not going outside of the scope of the cross examination, if you call it that, or re-direct examination at all. The plaintiff is trying to leave the impression with respect to the Inglewood area that the pictures were all licensed to the United Artists Theatre. He has been talking about a so-called split and he has asked, I don't know how many questions, about whether there was some sort of arrangement in Inglewood that made the Loew's pictures [520] all go to the United Artists Theatre.

I am going to show it just isn't so, that picture by picture, these things were bid and that they went to one theatre and then to another, and it is perfectly proper redirect examination, your Honor.

The Court: Objection overruled.

Q. (By Mr. Mitchell): Now, will you answer the question, whether that correctly shows what I have stated. Do you remember the question?

A. Yes, I remember it.

Q. Let me ask the question again. Does this correctly show in the Inglewood area, Inglewood-Westchester area, from May 1, 1950, to September 18, 1951, the theatres from which offers were requested, bids were requested, the theatres which submitted bids, and the theatres to which the pictures were awarded?

A. That is correct.

(Testimony of George A. Hickey.)

The Court: Now, may I ask a question? Do you know if bids were requested in these theatres, did you send out a written memorandum? What kind of records did you keep in your office to show that the bids were requested?

The Witness: We have the bids.

Mr. Mitchell: One by one, we have them here, your Honor.

The Witness: We have those bids. [521]

Mr. Mitchell: It is just a matter of saving ultimate time, that's all.

The Court: You have the bids, you kept a record, did you, of the bids?

The Witness: Yes, sir.

The Court: And a record of the people you requested bids from?

The Witness: That is correct.

The Court: All right. Go ahead, Mr. Mitchell. I wanted to be sure that there was a record kept.

Mr. Mitchell: That's right.

Q. Just so there will be no question here, this happens to be the picture *A Life of Her Own*. Here is a letter dated September 11, 1950. Is this the kind of a request for bids you are referring to?

A. That's right.

Q. This appears to be a request sent to Mr. Kupper.

A. That's right.

Q. He is La Tijera and Imperial Theatres.

A. That's right. We sent them out.

Mr. Mitchell: May I read this, then, into the record, so there will be no question?

(Testimony of George A. Hickey.)

The Court: Yes.

Mr. Mitchell: September 11, 1950, to Mr. W. J. Kupper, Jr., West Theatres, Inc., 6820 La Tijera Boulevard, [522] Los Angeles, California.

Over at the right-hand side, La Tijera Theatre, Los Angeles, and in the middle of the page, A Life of Her Own.

That is the name of the picture.

Underneath that, 7 days after Los Angeles first run closing or as available.

Underneath that, 14 days to play and clear over the Century Drive-In, Inglewood, 14 days from closing over the Paradise, Los Angeles, and the United Artists, Fox, Fifth Avenue, and the Academy Theatres, Inglewood; 21 days to play clear over the Plaza Theatre, Hawthorne; 28 days from closing over the Ritz or Inglewood Theatres and the Lennox Theatre, Lennox.

September 19, 1950.

Q. What is that September 19th? Is that the date when the picture would be available?

A. I believe so. [523]

Q. Now, when you refer——

The Court: May I see that for a moment, Mr. Mitchell.

Mr. Mitchell: Yes, your Honor.

The Court: Now, this was sent out to the La Tijera Theatre. What does it mean "14 days over the Paradise, Los Angeles"? What does that mean?

Wasn't this invitation for bids sent to all of the theatres regardless?



(Testimony of George A. Hickey.)

The Witness: All of the theatres in that area that were bidding.

The Court: Well, you have here "Over 14 days—14 days over Paradise." This was an invitation for a bid, wasn't it?

The Witness: No. They requested it and then we sent it out.

Mr. Westbrook: There is a similar request in there to the Paradise.

The Court: Let us have the Paradise. I want to know what that means.

Q. (By Mr. Mitchell): Does that have anything to do with clearance, Mr. Hickey, the 14 days?

A. Yes. Well, it tells them when they can play it.

Q. Explain to Judge Westover what the 14 days mean. A. 14 days over what?

The Court: Over Paradise. [524]

Q. (By Mr. Mitchell): This is the La Tijera Theatre request for bid and it says "14 days to play clear over the Century Drive In." What does that mean?

A. Well, the Century Drive In plays 14 days—it has 14 days to play and clear.

In other words, if he gets the picture on the 10th, they have 14 days to play it or clear it within their availability.

If they have 28 days clearance, they have got 14 days to play the picture and clear it before the other fellow gets it 28 days.

Q. Before the Century gets it? A. Yes.



(Testimony of George A. Hickey.)

The Court: Was there an identical notice sent to the Paradise Theatre?

The Witness: Yes, sir.

Mr. Mitchell: I will show that in just a moment.

Q. Now, it says here "14 days from closing over the Paradise, United Artists, Fox, Fifth Avenue and Academy."

Now, if the La Tijera gets the bid then what happens by reason of that sentence?

A. Well, they have 14 days to play it and clear it.

Read the sentence again.

Q. "14 days from clearing over the Paradise, Los Angeles, and the United Artists, Fox, Fifth Avenue and Academy [525] Theatre, Inglewood."

A. They have 14 days from the closing of the picture in the La Tijera.

Q. What do you mean? Do you mean they have 14 days from the closing?

A. They have got 14 days—they have to wait 14 days.

Q. You mean these other theatres have to wait 14 days after the La Tijera wins the bid?

A. That is right.

Q. Let us go to the Paradise request.

The Court: I notice you have a return receipt with those. Were they sent out by registered mail or anything like that?

The Witness: Some of them we do. We send them out by registered mail because sometimes the exhibitors claim that they don't get them and those

(Testimony of George A. Hickey.)

exhibitors that do that we send them registered mail so we are sure that they get them.

The Court: All I know about that is that I saw it on the La Tijera bid. I didn't know what conclusion to draw from your statement.

Q. (By Mr. Mitchell): You sent one registered mail to the Paradise, didn't you?

A. I believe so.

Q. All right. Now, this is the request to the Paradise for bid on the picture *A Life of Her Own*? [526] A. That's right.

Q. Now, if I may, I will read that one.

The Court: Read it.

Mr. Mitchell: "September 12, 1950. Mr. Marco Wolff."

Q. Who was Marco Wolff with respect to the Paradise?

A. Well, Marco Wolff owns the, or, runs the Paramount in Hollywood and did at one time run the Paramount downtown, but for some reason or other he started to buy for the Paradise. I don't know why. He has no interest in it.

Q. He was buying for the Paradise?

A. He was buying the pictures for the Paradise.

Q. All right. "Mr. Marco Wolff. 6838 Hollywood Boulevard, Los Angeles 28, California.

"Paradise Theatre, Los Angeles, Cal."

There is no dispute but that Marco Wolff was buying pictures for the Paradise in late 1950?

Mr. Corinblit: No dispute whatsoever.

Mr. Mitchell: All right.

(Testimony of George A. Hickey.)

“Picture Life of Her Own, 7 days after Los Angeles first run closing or as of availability.

“14 days to play and clear over the Century Drive In, Inglewood, 14 days from closing over the La Tijera Theatre, Los Angeles, and the United Artists, Fox, Fifth Avenue, Academy Theatre, Inglewood, 21 days to play and clear over the Plaza Theatre, Hawthorne. 28 days from closing over the [527] Ritz or Inglewood Theatres, and the Lennox Theatre, Lennox. September 19, 1950.”

Q. Now, where this says, Mr. Hickey, “14 days from closing over the La Tijera,” does that mean that if the Paradise wins the bid that it has 14 days clearance over the La Tijera?

A. No. It means that if a picture runs—this says the La Tijera, doesn’t it?

Q. Says “14 days from closing over the La Tijera.”

A. From closing over the La Tijera?

Q. Says “14 days close over La Tijera.”

A. They get 14 days of clearance after it closes.

Q. After it closes the La Tijera can’t play until 14 days has expired? A. That is right.

Q. If the Paradise gets the bid?

A. That is right.

Q. Similarly, it says:

“14 days close, 14 days from closing over United Artists, Fox, Fifth Avenue and Academy Theatres.”

A. That means those theatres can’t play until 14 days after the Paradise is closed.

Q. If the Paradise gets the bid?

(Testimony of George A. Hickey.)

A. That is right.

Q. And you give that same privilege to every theatre [528] in the area that you ask to bid?

A. Yes. It depends upon their location. Yes, sir, in that area they would get that.

Q. These theatres all get reciprocal rights?

A. That is right.

Q. And undertake reciprocal disadvantages?

A. That is right.

The Court: I understand the same letter was sent out to all of the theatres in that area?

The Witness: Everybody. The only one exception to that, if we don't like any of the bids, we turn them all down and then we re-negotiate, sometimes on the phone or talk to them personally, but the first time they go out that is the way they go out.

Q. (By Mr. Mitchell): Now, if your Honor would like to follow this, I will furnish you with a copy.

The Court: All right.

Q. (By Mr. Mitchell): All right. Now, Mr. Hickey, if you will put on your glasses again.

This starts with the picture called *The Big Hangover* in 1950.

Mr. Corinblit: Pardon me, your Honor. If we are going to go into this, I think it is outside of the scope of direct and object on that ground, but I suppose there ought to be an offer of a document in evidence if he is going to read from [529] it.

But I don't believe that this is proper examination and I object on those grounds.

(Testimony of George A. Hickey.)

The Court: I overruled that objection.

Mr. Mitchell: I will offer the document in evidence.

The Court: It may be received in evidence.

The Clerk: Loew's Exhibit K-1.

Q. (By Mr. Mitchell): All right. Now, the picture *The Big Hangover*, bids were requested from what theatres?

A. From the La Tijera, United Artists, Fox, Fifth Avenue and Academy.

Q. Now, so as to avoid a duplication of this, you continued to send bid letters to all of these pictures that I am going to ask you about, to those theatres until September 1950, is that right?

A. That is right.

Q. Then we will come to that in a moment. All right. Now, on *The Big Hangover* who sent in bids?

A. The La Tijera and the Academy.

Q. And who won the bid?

A. The La Tijera.

Q. All right. The next picture is *Asphalt Jungle*. Who sent in bids?

A. La Tijera, United Artists, Fox, Fifth Avenue—— [530]

Q. Wait a minute. Listen to my question. Who sent in bids? A. Let me see.

Q. The middle column is the one.

A. Oh, yes, it was the La Tijera, Fifth Avenue and United Artists. [531]

Q. And to whom was the picture awarded?

A. Fifth Avenue.



(Testimony of George A. Hickey.)

Q. The next picture is Annie Get Your Gun. Who submitted bids?

A. La Tijera, the United Artists, and the Academy, and the United Artists got the picture.

Q. The next picture is Crisis.

A. La Tijera, United Artists, and the Fifth Avenue sent in bids, and the La Tijera got the picture.

Q. The next picture is Father of the Bride.

A. La Tijera, United Artists and the Academy sent in bids, and the United Artists got the picture.

Q. The next picture is Duchess of Idaho.

A. The La Tijera, the United Artists, and the Fifth Avenue and Academy sent in bids, and the La Tijera got it, but we negotiated. We didn't like the first bid and we negotiated afterwards. That is what I was referring to a few minutes ago when I said we turned down the first bid. If there is one sent in and we don't like it, we negotiate a deal.

Q. The next picture is Happy Year. Who sent in bids?

A. The La Tijera, United Artists and Academy, and United Artists got it.

Q. The next picture is Skipper Surprised His Wife. Who sent in bids?

A. The La Tijera, United Artists, Fifth Avenue, and the [532] Fifth Avenue got it.

Q. The next picture is Stars In My Crown. Who sent in bids?

A. La Tijera, United Artists, Fifth Avenue, and the United Artists got it.